83-2161 (15)

No. 83-_______

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF MONTANA, et al.,
Petitioners,

vs.

BLACKFEET TRIBE OF INDIANS,
Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

BLACKFEET TRIBE of INDIANS,

Plaintiff-Appellant,

v.

STATE OF MONTANA, DIRECTOR OF THE MONTANA DEPARTMENT OF REVENUE, GLACIER COUNTY, MONTANA, and PONDERA COUNTY, MONTANA,

Defendants-Appellees.

No. 81-3041
United States Court of Appeals,
Ninth Circuit
Appeal from the United States
District Court for the
District of Montana
Hon. Paul G. Hatfield, Presiding

Argued and Submitted En Banc:
November 16, 1983
Decided April 3, 1984

BEFORE: GOODWIN, WALLACE, KENNEDY, ANDERSON, FLETCHER, FARRIS, PREGERSON, CANBY, BOOCHEVER, NORRIS and REINHARDT, Circuit Judges.

FLETCHER, Circuit Judge:

This case involves the scope of state authority to tax the proceeds of tribal mineral leases, and requires that we examine a series of congressional enactments regulating the leasing of tribal land for oil and gas production.

Between 1932 and 1968, the Blackfeet Tribe executed 125 leases authorizing the mining of oil and gas on tribal land located within the Blackfeet Indian Reservation. Approximately 12 of the leases were made under the authority of the Act of February 28, 1891, ch. 383, 26 Stat. 795, as amended by the Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. §§ 397-98 (1976)). The balance of the leases were made under the authority of the Act of May 11, 1938, ch. 198, 52 Stat. 347 (codified at 24 U.S.C. §§ 396a-396g (1976)). All 125 leases remain in operation today and will

continue until the oil and gas supply is exhausted. The Tribe is paid royalties calculated on the basis of the amount of gas or oil produced under the leases. The State of Montana imposes four distinct taxes on the Tribe's royalty interests, without distinguishing between the royalties collected pursuant to 1938 Act leases and the royalties collected under 1891 Act leases. _See_ Mont. Code Ann. §§ 15-36-101 to -121 (1981) (Oil and Gas Severance Tax); Mont. Code Ann. §§ 15-38-101 to -109 (1981) (Resource Indemnity Trust Tax); Mont. Code Ann. §§ 82-11-131 to -132 (1981) (Oil and Gas Conservation Tax); Mont. Code Ann. §§ 15-23-601 to -612 (1981) (Oil and Gas Net Proceeds Tax). Montana assesses the Tribe's share of all four taxes against the producer-lessees, who then deduct it from the royalties payable to the Tribe.

In 1977, the Solicitor of the Department of the Interior issued an opinion concluding that Montana was entitled to tax the production of oil and gas under 1891 Act leases, but could not tax tribal proceeds from 1938 Act leases. Tax Status of The Production of Oil and Gas from Leases of The Fort Peck Tribal Lands Under The 1938 Mineral Leasing Act, 84 Interior Dec. 905 (1977).[1] Montana continued to assess taxes against the

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1 Montana insists that no deference is due the interpretation of the Interior Department because its position in the six years since 1977 contradicts its position during the prior fifty years. Montana greatly overstates its case. Only two unpublished opinions, one in 1956 and a second in 1966, contradict the Department's current interpretation. See infra Section III. The other decisions on which Montana relies were either decided prior to the enactment of the 1938 leasing statute or concerned the taxation of leases issued under prior statutes. See 84 Interior Dec. at 911.

Tribe's royalty interests under all 125 leases. In 1978, the Tribe filed an action in federal court seeking to enjoin Montana's taxation of tribal royalties. The district court entered summary judgment for the State of Montana, holding that the 1924 amendment to the 1891 Act expressly authorized state taxation of production of oil and gas on Indian lands, and that the 1938 Act left that authority undisturbed.

A panel of this court affirmed the district court's decision. We ordered a rehearing en banc in order to resolve a conflict between the opinion and our decision in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 230 (1982).

Montana argues on appeal that Congress consented to the imposition of its taxes in the Act of May 29, 1924. The Tribe concedes that the 1924 Act expressly consented to taxation of oil and gas production on Indian land, but argues that the 1924 Act was implicitly repealed by section 7 of the Act of May 11, 1938.[2] Alternatively, the Tribe argues that the consent to taxation found in the 1924 Act is inapplicable to production of oil and gas under leases governed by the 1938 Act. The legislative history of the two statutes contains little explicit guidance, and resort to conventional "canons of construction"

2 Section 7 provides: "All Act or parts of Acts inconsistent herewith are hereby repealed."

yields inconsistent results.[3] Our resolution of this difficult issue requires a thorough analysis of the language, purpose and historical contexts of both statutory schemes.

I

We begin with the well settled principle that state taxation of tribal income from activities carried on within the boundaries of the reservation is impermissible unless Congress has expressly consented to the imposition of the tax. See Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated

3 The Tribe calls our attention to the canon that Indian legislation is to be construed liberally in favor of Indians and ambiguities to be resolved in their favor. Montana invokes the rule that repeals by implication are disfavored, insisting that courts must construe potentially inconsistent statutes so as to give both statutes effect.

Salish & Kootenai Tribes, 425 U.S. 463 (1976). We must resolve whether the 1924 Act explicitly consented to the taxes here at issue. The consent to taxation contained in the 1924 Act was part of an amendment to the Act of February 28, 1891, ch. 383, 26 Stat. 794, which was itself an amendment to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388. The 1924 Act was one of a series of similar statutes providing for non-Indian leasing and development of Indian lands within the context of the policies embodied in the General Allotment Act. See, e.g., Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31-34 (codified as amended at 25 U.S.C. § 399 (1976)); Act of September 20, 1922, ch. 347, 42 Stat. 857

(codified at 25 U.S.C. § 400 (1976)).[4] Our analysis therefore begins with the program reflected in the General Allotment Act of 1887, and Congress's efforts to effectuate it.

The primary purpose of the General Allotment Act was the speedy assimilation of the Indians. See generally 17 Cong. Rec. 1630-35, 1762-64 (1886); F. Cohen, Handbook of Federal Indian Law 128-32 (1982). Each Indian was to receive an allotment of land, to be held in trust

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4 See also Appropriations Act of March 3, 1909, ch. 263, 35 Stat. 781, 783 (codified at 25 U.S.C. § 396 (1976)); Act of April 28, 1924, ch. 135, 43 Stat. 111 (codified at 25 U.S.C. 401 (1976)); Act of April 17, 1926, ch. 156, 44 Stat. 300 (codified at 25 U.S.C. § 400a (1976)); Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. § 398a (1976). See generally United States Department of the Interior, Federal Indian Law 115-127 (1958); F. Cohen, Handbook of Federal Indian Law 132-43, 528-29 (1982).

for 25 years.[5] The Forty-Ninth Congress envisioned a period during which the Indians would be "civilized" and the tribal system destroyed, after which the Indians would succeed to fee ownership of their lands and all of the privileges and obligations of citizenship. See, e.g., 17 Cong. Rec. 1632 (1886) (remarks of Mr. Maxey); id. at 1763 (remarks of Mr. Dawes); F. Cohen, supra, at 131-32; G.D. Taylor, The New Deal and American Indian Tribalism 4-5 (1980). The Act further provided for the sale of surplus land, and the use of the proceeds for the education and civilization of members of the tribes.[6]

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5 The trust period was subject to extension by the President, and was subsequently extended. See Appropriations Act of June 21, 1906, ch. 3504, 34 Stat. 325, 326 (codified at 25 U.S.C. § 391 (1976)).

6 See F. Cohen, supra note 4, at 131-32. During the first ten years of

In 1891, Congress responded to public pressure to open reservation land for settlement and mining by amending the allotment act to permit short term leases of unallotted lands and lands allotted to aged and disabled allottees. See Act of February 28, 1891, ch. 383, § 3, 26 Stat. 794, 795; F. Cohen, supra, at 134-35.[7] In 1910, Congress enacted a measure permitting short term leasing of allotted lands and directing the Secretary of the

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(Footnote 6 continued) allotment, 55 million acres of "surplus" land were sold to white settlers. See G. D. Taylor, The New Deal and American Indian Tribalism 5 (1980). See also 78 Cong. Rec. 11134-37 (1934) (debate on effect of S. 3645, 73d Cong., 2d Sess., on surplus lands provision of 1887 Act).

7 Minor relaxations in the restrictions on such leases were enacted over the next 20 years. See Appropriations Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 305; Appropriations Act of May 31, 1900, ch. 598, § 1, 31 Stat. 221, 229 (codified at 25 U.S.C. § 395 (1976)). See generally F. Cohen, supra note 4, at 135.

Interior to supervise the expenditure of funds earned under the leases.[8] See Act of June 25, 1910, ch. 431, § 4, 36 Stat. 855, 856. The Indian Appropriations Act of 1919 included comprehensive provisions permitting long term mineral leasing of unallotted lands in western states. See Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31-34 (codified as amended at 25 U.S.C. § 399 (1976)). The Act of May 29, 1924, ch. 210, 43 Stat. 244, extended the terms of 1891 Act oil

8 See G.D. Taylor, supra note 6, at 6:

During the trust period the allotted land could be leased, and Indians were encouraged to lease their lands for relatively modest fees. In the case of the Civilized Tribes in Oklahoma, local real estate agents selected the sites for allotment, then rented the land from the Indians and sublet it at a profit to white farmers. In other cases the [Bureau of Indian Affairs], as trustee, administered the leases but failed to ensure that the Indians received the maximum possible rent from the land.

and gas production leases from a ten-year period to "as long as oil or gas shall be found in paying quantities," authorized the Secretary of the Interior to enter into further oil and gas leases for the extended period, and consented to state taxation of mineral production on unallotted lands "bought and paid for" by the Indians. See British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936).[9] Between 1920 and

9 In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 164-65 (1936), the Supreme Court construed the "bought and paid for" language to apply to unallotted land within treaty reservations, including unallotted reserved mineral rights in or under allotted lands. The Court held that the 1924 Act's consent to taxation extended to mineral leases issued under the Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 32 (codified as amended at 25 U.S.C. § 399 (1976)). Id. at 166. We believe that the British-American Court's interpretation of the statutory language of the 1924 Act is problematic. See F. Cohen, supra note 4, at 409 n.40, 529 n.5. We follow it

1930, several other statutes were enacted to permit the leasing of additional categories of reservation land.[10]

All of these leasing provisions had a number of common features. The leases

(Footnote 9 continued) with respect to leases issued before the enactment of the 1938 statute. In view of our interpretation of the 1938 Act, we need not reach the question of whether the Court's 1936 analysis applies to the 1938 Act. See id. at 529 n.5.

10 See Act of March 3, 1921, ch. 119, 41 Stat. 1225, 1249 (Quapaw Reservation); Act of March 3, 1921, ch. 120, 41 Stat. 1249, 1250 (Osage Reservation); Act of Sept. 20, 1922, ch. 347, 42 Stat. 857 (codified at 25 U.S.C. § 400 (1976)) (unallotted lands in Fort Peck and Blackfeet Reservations); Act of April 28, 1924, ch. 135, 43 Stat. 111 (codified at 25 U.S.C. § 401 (1976)) (unallotted lands in Kaw Reservation); Act of May 26, 1926, ch. 403, § 6, 44 Stat. 658, 659-60 (Crow Reservation); Act of July 3, 1926, ch. 787, 44 Stat. 894 (codified at 25 U.S.C. § 402a (1976)) (unalloted irrigable lands for farming purposes); Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified at 25 U.S.C. 398a-398e (1976)) (unallotted lands on executive order reservations). The 1927 Act and both 1921 Acts expressly consented to state taxation; the other four Acts did not.

were regulated and approved by the Secretary of the Interior.[11] The proceeds were paid to the Secretary of the Interior and disbursed, by congressional appropriation, for the benefit of the Indians. The tribes had no authority to police or cancel leases or to direct the purposes for which revenue earned under the leases would be spent. See generally F. Cohen, supra, at 533-34.

The legislative history of these enactments reflects certain common themes. Congress evinced concern about

11 Leases entered into under the 1891 Act were to be granted "by authority of the council speaking for such Indians . . . subject to the approval of the Secretary of the Interior." Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 794, 795. The 1924 Act amended the procedure to provide for leasing at public auction "by the Secretary of the Interior with the consent of the council speaking for such Indians." Act of May 29, 1924, ch. 210, 43 Stat. 244. The 1919 Act made no provision for tribal consent.

the increasing size of Indian appropriations, and desired that a greater portion of the federal expenditures be made from the Indians' funds. See, e.g., H. Rep. No. 1791, 69th Cong. 2d Sess. (1927); 68 Cong. Rec. 4574-75 (1927) (remarks of Mr. Letts); 58 Cong. Rec. 175 (1919) (remarks of Mr. Snyder); id. at 207-08 (colloquy); F. Cohen, supra, at 135-36. Representatives expressed frustration at the fact that the assimilation sought under the General Allotment Act failed to proceed with the contemplated dispatch. See, e.g., 68 Cong. Rec. 4704 (1927) (remarks of Mr. Morrow); 58 Cong. Rec. 174-75 (1919) (remarks of Mr. Snyder). States complained that reservation lands were remaining tax exempt for too long a period, see 58 Cong. Rec. 180-81 (1919) (remarks of Mr. McKeown); id. at 184 (remarks of Mr. Howard); 45 Cong. Rec

6079 (1910) (colloquy), and urged strenuously that the lands be opened for increased non-Indian development and settlement. See, e.g., 68 Cong Rec. 4575 (1927) (remarks of Mr. Frear); 58 Cong. Rec. 181 (1919) (remarks of Mr. McKeown); id. at 216 (remarks of Mr. Carter); 45 Cong. Rec. 6096 (1910) (remarks of Mr. McGuire); F. Cohen, supra, at 128, 134-35.

The 1924 Act was responsive to these concerns. By extending the period of oil and gas production leases it encouraged further non-Indian development of reservation lands. The revenue thereby produced became available to reimburse the Treasury for its appropriations for the Indians' "education" and "civilization" -- measures that Congress hoped

would speed assimilation.[12] The consent to taxation placated states impatient with the Indians' tax-exempt status.[13] See S. Rep. No. 546, 68th Cong., 1st Sess. (1924); 65 Cong. Rec. 6844 (1924) (Remarks of Mr. Hastings); see generally F. Cohen, supra, at 134-42, 533-34; United States Department of the Interior, Federal Indian Law 125-26 (1958).

In 1934, Congress repudiated the allotment program. After studying its implementation, members of the Congressional Committees on Indian Affairs concluded that the results of the program

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12 See generally 58 Cong. Rec. 173-77 (1919); F. Cohen, supra note 4 at 139-41.

13 See generally Loss of Revenue - Tax Exempt Indian Lands: Hearing on S. Res. 168 before the Senate Comm. on Indian Affairs, 75th Cong., 3d Sess. (1938), for accounts of unsuccessful state attempts to tax oil and mineral production on reservation lands during the early part of the twentieth century.

had become "a scandal and a blot on our name in every part of the world." 78 Cong. Rec. 11727 (1934) (remarks of Mr. Howard). See also id. at 11126 (remarks of Mr. King); id. at 11743 (remarks of Mr. Frear).[14] In a complete about-face, Congress enacted legislation to reverse

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14 Congressman Howard, a sponsor of the Indian Reorganization Act, described the allotment program as follows:

> In the debates that accompanied the passing of the allotment act, it is clear that the proponents of this measure were convinced that the private ownership of land was the one great step that was needed to civilize the Indians. The mere issuance of a fee patent would give to the Indians pride of ownership, thrift, industry, and the means of self-support; it would break down the tribal status of the Indians and convert them into typical American citizens; it would, they said, solve the Indian problem, and in the course of a single generation relieve the Government of the immense and costly burden of caring for its Indian wards. There were, to be sure, a few farsighted men who predicted that the allotment law would lead to the economic ruin of the Indians, but their voices were

the effects of 47 years of federal Indian policy. The Indian

(Footnote 14 continued) lost in the chorus of optimism which accompanied the passage of the allotment act.

. . .

The allotment act, so far from being a means of civilizing the Indians soon became a perfect tool for the capture of Indian lands....

. . .

As a result of this system, the allotted Indian reservations are in general riddled by alienations, the extent of the alienation being almost exactly proportionate to the length of time since the original allotment was made. The Indians of many tribes have lost practically every square foot of land they owned. Many reservations have in Indian ownership a mere fragment of the original land and all the remaining allotted reservations are badly checkerboarded....

. . .

This poverty contributes largely to the excessive death rate among the Indians, which, in the case of tuberculosis, a disease closely associated with under-nourishment, is more than seven times the death rate from tuberculosis among the whole population.

Reorganization Act [IRA], ch. 576, 48 Stat. 984 (1934) (codified as amended at

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(Footnote 14 continued)

. . .

Although many thousand of Indians are living in tribal status on the various reservations, their own native tribal institutions have very largely disintegrated or been openly suppressed, and the entire management of Indian affairs has been more and more concentrated in the hands of the Federal Indian Service. The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy -- absolutism built up on the most rigid bureaucratic lines, irresponsible to the Indians and to the public, shackled by obsolete laws; resistant to change, reform, or progress; which, over a century, has handled the Indians without understanding or sympathy, which has used methods of repression and suppression unparallelled in the modern world outside of Czarist Russia and the Belgian Congo.

78 Cong. Rec. 11727-29 (1934).

25 U.S.C. §§ 461-479 (1976)), prohibited further allotment of Indian land, sought to return to the Tribes some portion of the 90 million acres of Indian land that had passed into non-Indian ownership under the allotment program, and authorized tribes to establish tribal governments with authority over the development and exploitation of Indian land and resources. Tribes that elected to organize under the Act were entitled "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. . . ." IRA § 16, 48 Stat. 984, 987 (codified at 25 U.S.C. § 476 (1976)). Among the purposes of the IRA were the promotion of a significant increase in tribal autonomy and authority and the extension to the tribes of "an opportunity to take over

the control of their own resources." 78 Cong. Rec. 11123-25 (1934) (remarks of Mr. Wheeler). See Morton v. Mancari, 417 U.S. 535, 542 (1974); F. Cohen, supra, at 147. The tax exempt and trust status of unallotted and restricted reservation lands was continued indefinitely, a provision that induced at least one state to insist that tribes within its borders be excluded from the Act. See 78 Cong. Rec. 11126 (1934) (remarks of Mr. Thomas); IRA § 13 (codified at 25 U.S.C. § 473 (1976)).[15]

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15 The district court noted that another purpose of the IRA was to enable Indians to enter the economic world on an equal footing. See, e.g., 78 Cong. Rec. 11730-31 (1934) (remarks of Mr. Howard). The IRA sought to accomplish this goal by authorizing tribes to form corporations, establishing a revolving credit fund for the benefit of these tribal corporations and their members, authorizing the purchase of additional land destined for tax-exempt Indian ownership, extending the tax-exempt and restricted status of existing unallotted Indian holdings,

Congress recognized that the various statutory provisions permitting leasing

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(Footnote 15 continued) appropriating funds for college and technical education, and increasing Indian participation in and management of livestock and timber operations on tribal land. Id.; see also id. at 11123 (remarks of Mr. Wheeler).

Congress intended to effectuate increased tribal independence and economic power, but did not envision giving up federal responsibility for supervising these developments and providing necessary services for the Indians, and did not intend to turn its responsibility over to the states. Indeed, much of the opposition to the legislation was premised on its failure to reject protectionist policies. See, e.g., id. at 11126-27 (remarks of Mr. King); id. at 11733 (remarks of Mr. Kelley).

In the same legislative session, Congress enacted the Johnson-O'Malley Act, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 452-54 (1976)), authorizing the Secretary of the Interior to contract with state governments for the provision of education, health care, agricultural assistance and social services to Indians at federal expense. The legislative history of the Johnson-O'Malley Act indicates that Congress envisioned the federal government's paying states to provide these benefits to Indians living in widely scattered communities where

of tribal land were scattered, inconsistent, and in conflict with the provisions of the IRA giving the tribes

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(Footnote 15 continued) maintenance of separate federal services and facilities would be impractical. See S. Rep. No. 511, 73d Cong. 2d Sess. (1934). A letter from Bureau of Indian Affairs Commissioner Collier, incorporated in the Senate Report, discloses that the Bureau anticipated that it would continue to provide services directly to Indians living in large tribal communities, unless the Indians themselves sought to take advantage of the possibility of state contract services. See id. at 4. Indeed, the Appropriations Act of March 2, 1934, ch. 38, 48 Stat. 362, 366-79, had allocated several million dollars in federal and tribal funds for Indian education, and three million dollars for Indian health services, see 48 Stat. at 3771-76; see also 78 Cong. Rec. 821-22 (remarks of Mr. Howard).

The Appropriations Acts for the period following the enactment of the IRA demonstrate Congress's continuing commitment to the principle that education, health care, social services and tribal police, firefighters and courts should be provided through a combination of federal and tribal funds. See, e.g., Appropriations Act of August 9, 1937, ch. 570, 50 Stat. 564, 574-90; see also, e.g., 81 Cong. Rec. 4515-16 (remarks of Mr. Johnson); id. at 4589-90 (remarks of Mr. Burdick). We conclude, from our examination of the IRA and the statutes

authority to prevent leasing of tribal lands. In 1935 Congress considered, but did not enact, a bill intended to amend existing leasing statutes to permit tribal councils to grant leases for the mining of unallotted lands, subject to the approval and regulations of the Secretary of the Interior.[16] Ultimately, Congress decided to replace, rather than amend, existing leasing laws. In 1937,

(Footnote 15 continued) Congress enacted during the same period, that Congress did intend the IRA to assist Indians in achieving some measure of economic parity. It is manifest, however, that Congress did not intend for Indians to be dependent upon state governments for the benefits and services state governments traditionally provide.

16 S. 2638, 74th Cong., 1st Sess. (1935). See 79 Cong. Rec. 6102, 7350, 7815, 8307, 8308, 8481 (1935).

after extensive hearings on the conditions under which Indians were living,[17] the Senate and House Committees on Indian Affairs introduced bills to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act." See S. Rep. No. 985, 75th Cong., 1st Sess. 3 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938). The Senate Bill was enacted as the Act of May 11, 1938.[18]

17 See, e.g., Survey of Conditions of the Indians in the United States: Hearings before a Subcomm. of the Senate Comm. on Indian Affairs, 75th Cong., 1st Sess. (1937); Survey of Conditions of the Indians in the United States: Hearings before a Subcomm. of the Senate Comm. on Indian Affairs, 74th Cong., 2d Sess. (1936); Conditions of Indians in the United States: Hearings before the House Comm. on Indian Affairs, 74th Cong., 2d Sess. (1936); Indian Conditions and Affairs: Hearings before the Subcomm. on General Bills of the House Comm. on Indian Affairs, 74th Cong., 1st Sess. (1935).

18 The 1938 Act provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in

It replaced the prior mineral leasing statutes with a comprehensive and detailed procedure for mineral leasing

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(Footnote 18 continued)
Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians, under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil-and/or gas-mining purposes covering such uanllotted [sic] lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to

of unallotted lands. See F. Cohen, supra, at 534. The Senate Report accompanying the bill noted that its

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(Footnote 18 continued)
complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said

purposes were to obtain uniformity

(Footnote 18 continued)
Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any

with respect to the leasing of tribal lands, give Indians authority in granting

(Footnote 18 continued)
restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act or parts of Acts inconsistent herewith are hereby repealed.

Act of May 11, 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g (1976)).

Six reservations were excluded from the operation of much of the Act. These included the Papago Reservation, subject to special mineral leasing provisions of section 3 of the IRA, and the Crow Reservation, which voted against organizing under the IRA, _see_ G. D. Taylor, _supra_ note 6, at 33, and which was subject to leasing under the provisions of the Act of May 26, 1926, ch. 403, § 6, 44 Stat. 658, 659. Also excluded were lands that the Shoshone Reservation had ceded to the United States, and three Oklahoma reservations that had been excluded from the IRA. The Crow and Papago reservations were ultimately made subject to the 1938 Act's provisions.

or denying leases, and enable the Indians to gain the greatest return from their property. S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937). The Act made no mention of taxation, and the legislative history is silent on the issue.

II

The Tribe argues that the 1938 Act's general repealer clause implicitly repealed the 1924 consent to taxation. We disagree. Many of the leases entered into under the authority of earlier statutes remained effective, indeed, remain effective today, because the prior statutory provisions authorized leases to continue for an indefinite term. See

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(Footnote 18 continued) See Act of May 27, 1955, ch. 106, § 1, 69 Stat. 67; Act of May 17, 1968, Pub. L. 90-308, 82 Stat. 123. See generally P. Maxfield, M. Dieterich & F. Trelease, Natural Resources Law on American Indian Lands 164 (1977).

Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 32 ("irrevocable" with certain exceptions); Act of May 29, 1924, ch. 210, 43 Stat. 244 ("as long as oil or gas shall be found in paying quantities"). The 1938 Act expressly limits its application to leases entered into after the Act's effective date. In section one, the Act provides that "hereafter unallotted lands . . . may . . . be leased for mining purposes. . . ." The "hereafter" language is echoed in section 3 of the Act. Finally, section 4 of the Act provides that "operations under any oil, gas, or other mineral lease issued pursuant to the terms of this <u>or any other Act</u> affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior." (Emphasis supplied). We

infer from the statutory language that Congress envisioned that leases issued pursuant to prior acts would continue to be effective for their duration, subject to regulations promulgated by the Secretary and to the statutes under which they were executed. Leases made after the effective date of the Act, however, were to be governed by the new terms and procedures.[19] This interpretation, we believe, is both the most natural reading

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19 We acknowledge that the statutory language is susceptible to more than one interpretation. The 1938 Act excludes six Indian tribes from its scope and, in addition, expressly preserves the authority of tribes organized under the IRA to lease lands for mining purposes according to the provisions of their tribal constitutions or charters. See supra note 17. The reference to leases issued pursuant to "any other statute" might thus be read to refer only to the IRA and statutes affecting the six excluded tribes. We feel constrained to reject this interpretation because it makes no provision for extant, indefinite-term leases entered into under prior statutes.

of the statutory language and the reading best adapted to the effectuation of the statute's purposes. To infer repeal of the prior statutes on the basis of the general repealer in section 7 of the Act would introduce serious uncertainty as to the legal status of the indefinite-term leases executed under earlier acts and cast doubt on the Secretary's authority to continue to regulate them. Such a result would serve neither the interests of the Tribe nor the interests of the producer-lessees.

Having concluded that the 1938 Act superseded but did not repeal prior leasing statutes, we turn to the current effect of the consent to taxation contained in the 1924 amendment to the 1891 Act. We hold that leases executed pursuant to the 1891 and 1924 Acts remain subject to those Acts, and to the

regulations promulgated by the Secretary under the authority of section 4 of the 1938 Act for regulation of leases issued "pursuant to the terms of this or any other Act." It follows that the 1924 Act's consent to state taxation remains effective with respect to leases executed under the 1924 and 1891 Acts.[20] We therefore affirm the district court's grant of summary judgment to the State of Montana insofar as it upholds the validity of taxing tribal proceeds from 1924 Act and 1891 Act leases.

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20 Professor Cohen's treatise suggests a similar interpretation:

> The [1938] Act omits any taxing authorization and includes a provision repealing "[a]ll Act [sic] or parts of Acts inconsistent herewith." The latter provision likely repealed the prior leasing Acts to which the tax consents had related (as to new leases).

F. Cohen, supra note 4, at 409 (emphasis supplied; footnotes omitted).

III

Montana argues that if the 1938 Act did not implicitly repeal the 1924 Act, it must be read implicitly to have incorporated the 1924 Act. Therefore, Montana contends, if it may tax oil and gas production under 1891 and 1924 Act leases, it may tax production under 1938 Act leases as well. The district court found this argument persuasive. We do not.

The 1924 Act in its entirety provides as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the

> Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

Ch. 211, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1976)). Montana concedes that the provisions of the Act concerned with the procedure for issuing leases and the duration of leases have been

superseded by the 1938 Act. Moreover, the statutory method for collecting the tax -- disbursement by the Secretary -- seems equally inapplicable to the current leases. Montana argues, however, that the language "Provided, that the production of oil or gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands . . ." is nowhere contradicted by the 1938 Act and is inconsistent with no provision of the later statute. Therefore, Montana insists, Congress's silence in 1938 on the subject of taxation must be interpreted as an implicit incorporation of the taxation portion of the 1924 Act into the 1938 statutory scheme.

Montana's argument is, in essence, an invocation of assorted maxims of

statutory construction. Citing United States v. Greathouse, 166 U.S. 601, 605 (1897), Montana advises us of the rule that where two statutes on the same subject matter are not absolutely irreconcilable, both should be given effect. Montana also draws comfort from the canon that a long held agency interpretation of a statute in which Congress has silently acquiesced is entitled to great deference. See United States v. Rutherford, 442 U.S. 544, 554 (1979). Montana points to informal decisions by the Solicitor of the Interior Department in 1956 and 1966 concluding that the 1924 Act's consent to state taxation applied to 1938 Act leases, and notes that the Department did not overrule these opinions until 1977. See 84 Interior Dec. 905, 911 (1977). In view of Congress's failure to alter the Department's 1956 interpretation, Montana

suggests that the Department behaved improperly in repudiating its earlier view. Therefore, it concludes, this court must defer to the Department's 1956 position.

In invoking what it terms "the applicable rules of statutory construction," by which, it insists, we are bound, Montana fails to appreciate that such rules are merely guideposts in discerning Congressional intent. See Busic v. United States, 446 U.S. 398, 406-07 (1980); United States v. United Continental Tuna Corp., 425 U.S. 164, 168-69 (1976); Gooch v. United States, 297 U.S. 124, 128 (1936); Shields v. United States, 698 F.2d 987, 990 (9th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 73 (1983).

Montana's argument that the 1924 consent must be construed as a blanket

consent to taxation, effective with respect to all mineral leases on unallotted treaty reservation lands unless issued under a statute prohibiting taxation, stretches the canon of construction disfavoring repeals by implication beyond its intended scope. The cases Montana cites that invoke this canon are not apposite. In one case, the canon was invoked to dispose of arguments that a statute addressing one concern repealed an earlier statute addressing another, see Morton v. Mancari, 417 U.S. 535 (1974) (Civil Rights Act did not repeal portion of IRA); in another, to dispose of arguments that an amendment to one part of a statute repealed another part, see Posadas v. National City Bank, 296 U.S. 497 (1936) (amendment to § 25 of Federal Reserve Act did not repeal unamended portion of section). We do not

quarrel with the proposition that it is generally unwise to conclude, in the absence of any evidence, that Congress intended to cause a prior statute to have no future effect. Where Congress has enacted legislation without attention to the provisions of prior Acts, courts should not attribute to Congress the unexpressed purpose of nullifying earlier statutes. This general principle, however, is inapplicable where, as here, all parties concede that Congress intended the later statute to supersede the prior one. In enacting the 1938 Act, Congress manifested an unmistakable intention to subject subsequent leases to the terms of the new statute rather than to its predecessors. The crucial inquiry is whether Congress nonetheless intended that a portion of one of the predecessor

statutes control a lease issued under the 1938 Act.

In ascertaining Congress's intent, we look to the language, legislative history and context of the 1938 Act, and find no manifestation of a purpose to subject leases under the new statutory scheme to the taxes authorized under several of the old statutory schemes. Montana asks that we infer such a purpose from Congress's silence. The Supreme Court has instructed us, however, that congressional consent to state taxation of tribal income from on-reservation activities must be express. See Bryan v. Itasca County, 426 U.S. 373, 393 (1976). We decline to hold that a canon of construction will suffice to supply the deficient express manifestation of

Congress's intent to permit the tax.[21]

Montana also insists that we must interpret the two statutes in accordance with the Interior Department's earlier position. The deference we should accord to administrative interpretations of statutes is not absolute. See Cruz v. Zapata Ocean Resources, Inc., 695 F.2d 428 (9th Cir. 1982). In this case, we note several factors that undermine the authority of the 1956 interpretation. The Interior Department adopted its 1956 position informally, and without any analysis of the question before us -- whether Congress intended the 1924 consent to taxation to apply to leases

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21 We note in addition, that commentators have expressed their opinions that the 1924 Act's consent to taxation is inapplicable to 1938 Act leases. See, e.g., F. Cohen, supra note 4, at 409; see also M. Price and R. Clinton, Law and the American Indian 804 (1983).

issued under the 1938 Act. See United States Dept. of the Interior Solicitor's Opinion M-36345 (May 4, 1956) (unpublished). The Interior Department's first articulation of this interpretation was not contemporaneous with the enactment of the 1938 statute, but rather, occurred 12 years later. The Department expressed this interpretaton [sic] only in unpublished memoranda. The inference of Congressional acquiescence Montana would have us draw is undermined where, as here, there is no evidence that the Department's interpretation was brought to Congress's attention. See also Girouard v. United States, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law."). Finally, the Department repudiated its earlier interpretation in 1977, see 84

Interior Dec. 905 (1977), in a published and carefully reasoned opinion that analyzed both statutes and the Department's prior rulings. In 1979, the Department reexamined and adhered to its 1977 position. See 86 Interior Dec. 181 (1979). Under these circumstances, confronted with two non-contemporaneous interpretations of the 1938 Act, we do not believe that we should defer to the informal, unpublished one merely because it is of earlier vintage.

We conclude that Montana's collection of maxims is insufficient support for what we view to be an unlikely proposition: that Congress intended that part of one sentence in one of the statutes otherwise totally superseded by the 1938 Act be incorporated into the 1938 Act, and that Congress manifested its intention through silence. There is

nothing in the legislative history or the language of the 1938 Act even hinting that Congress anticipated that the provisions of <u>any</u> of the prior leasing statutes would be applied to leases issued under the 1938 Act.

We note, in addition, that the 1924 Act was an integral part of Congress's allotment program, under which all Indian land was intended to become subject to state taxation after the expiration of a brief trust period. <u>See</u> United States Department of the Interior, <u>supra</u>, at 856-59; <u>supra</u> section I. Congress's consent to the exercise of state taxing authority over Indian Tribes was in harmony with the purposes of allotment. The 1938 Act, however, replaced prior mineral leasing statutes with a scheme calculated to advance the policies of tribal sovereignty and economic growth

reflected in the IRA. We fail to see how interpreting the 1938 Act to incorporate implicitly the portion of the 1924 Act consenting to state taxation would advance purposes of the 1938 Act.[22]

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22 The district court found harmony between the purposes of the IRA and the 1924 consent to taxation on the theory that the IRA sought to enable Indians to enter the economic world on an equal footing and taxation statutes are economic facts of oil and gas production. In identifying this harmonious aspect, the district court disregarded the IRA's express extension of the tax-exempt status of Indian land, <u>see</u> IRA §§ 2, 5, 48 Stat. 984, 984, 985 (codified at 25 U.S.C. §§ 462, 465 (1976)). In 1936, Congress acted to extend the tax exemption to land purchased with Indian trust or restricted funds, and appropriated money to reimburse Indians whose land had been taxed and redeem any land that had been forfeited for failure to pay assessed taxes. Act of June 20, 1936, ch. 622, 49 Stat. 984 (codified as amended at 25 U.S.C. § 421a (1976)). <u>See</u> H. R. Rep. 2398, 74th Cong., 2d Sess. (1936). Congress's commitment to the tax exempt status of restricted land, and its continuing appropriations for Indian education, health care, tribal police and tribal courts, services traditionally provided to state citizens by state

We hold that the 1924 Act's consent to taxation is inapplicable to the 1938 Act and to leases executed pursuant to its authority. Accordingly, we reverse so much of the district court's judgment as upheld the taxation of tribal royalties earned on 1938 Act leases.

IV

Montana argued to the district court that even if Congress had not consented to taxation of tribal proceeds from 1938 Act leases, its taxes were nonetheless valid because the legal incidence of the taxes fell on the non-Indian producer-lessees and not on the tribe. Because the district court concluded that the taxes were valid, it did not reach the

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(Footnote 22 continued) governments from state taxes, demonstrate to us that Congress did not intend for Indians to be treated equally for tax purposes. See, e.g., Appropriations Act of August 9, 1937, ch. 570, 50 Stat. 564, 574-90.

question of the taxes' legal incidence. We therefore remand the case to enable the district court to address this issue. Should the court determine that the legal incidence of the tax falls on the producer-lessees, it should then decide whether Montana's statutes are preempted under the standards articulated in Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 230 (1982).

AFFIRMED in part, REVERSED in part and REMANDED.

BLACKFEET TRIBE OF INDIANS v. WILLIAM GROFF, etc.

No. 81-3041

J. BLAINE ANDERSON, Circuit Judge, with whom WALLACE and KENNEDY, Circuit Judges, join, concurring and dissenting:

I concur, but with additional reasons, in the majority's holding that the 1938 Act did not impliedly repeal the 1924 Act. I respectfully dissent, however, from the majority's view that the 1924 Act's taxing authorization is inapplicable to leases entered into after promulgation of the 1938 Act.

My disagreement has three bases. First, the majority misapplies well-established rules of statutory construction by stating that the issue is whether the 1938 Act "expressly incorporated" the 1924 Act's taxing authorization. Majority Opinion at 13. Once

having concluded that the 1924 Act is still in effect, I fail to understand how it can be construed to have no force. Second, there has been a long-standing and consistent interpretation by the Department of Interior of the continued effectiveness of the 1924 Act's taxing authorization. I find this prior consistent interpretation much more indicative of the intended effect of the 1938 Act on the 1924 Act than the Department's reversal of its prior position in 1977. Third, if Congress meant to abrogate the authority of the states to tax the extraction of mineral resources on unallotted land as conferred by the 1924 Act, it surely would have made such an intent clear. It did not and it is not the province of this court to make that judgment for the legislative branch.

The majority opinion concludes that the 1924 Act was not impliedly repealed because the 1938 Act recognized the continued effectiveness of leases entered under the authority of prior acts. I agree with that observation, but I believe as well that other reasons compel such a conclusion.

Section 7 of the 1938 Act contains a "general repealing" clause. It is hornbook law that a general repealer is in "legal contemplation a nullity." 1A C. Sands, Sutherland Statutory Construction, § 23.08 at 221 (4th ed. 1972). In fact, a general repealer has been held to imply "very strongly that there may be acts on the same subject which are not thereby repealed." Hess v. Reynolds, 113 U.S. 73, 79 (1885). One must turn therefore to other rules governing the determination whether the 1938 Act

repealed the 1924 Act. Sutherland, supra. As Congress did not expressly repeal the 1924 Act, the question is whether it impliedly did so.

Repeals by implication are strongly disfavored. Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). As stated by the Supreme Court in Posadas:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest....

296 U.S. at 503.

Simply, there is no "irreconcilable conflict" between the provisions of the

1924 and 1938 Acts. There is no doubt the two statutes are capable of coexistence. The 1938 Act uses and expands the oil and gas leasing procedures outlined in the 1924 Act and applies them to all leases. Section 1 of the 1938 Act, 25 U.S.C. § 396a, reiterates much of the language of the 1924 Act regarding tribal council consent, BIA approval, and a general ten-year durational limit on the leases. Section 2 of the 1938 Act, 25 U.S.C. § 396b, expands the 1924's Act public auction requirements. The 1938 Act is silent regarding taxation. The language of the statute does not evince a clear indication that repeal of the taxing authorization was intended. On its face, taxation of mineral production is quite compatible with the 1938 Act.

Nor does the 1938 Act "cover the whole subject" of the 1924 Act, for

although the 1938 Act was an attempt to make uniform the "patch-work state" of the prior leasing laws, F. Cohen, Handbook of Federal Indian Law, 328 (1942 ed.), it is silent on the subject of taxation. It is true that the 1938 Act replaces the 1924 Act's leasing procedures. The taxing provision of the 1924 Act stands on its own, however. As stated in Posadas, an implied repeal will be found only to the extent of the conflict between the prior and latter statutes. 296 U.S. at 503. The 1938 Act does not address taxation and nothing otherwise indicates that taxation conflicts with it.

Last, there has been a long-term interpretation by the Department of Interior that the 1938 Act did not impliedly repeal the 1924 Act, including its taxing authorization. See 84

Interior Dec. 905 (1977) and its references to the prior opinions. Generally, the construction of a statute by the agency charged with its administration is entitled to great weight, especially when, as here, Congress has refused to alter the administrative interpretation. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

Once having concluded that no implied repeal occurred, the majority nonetheless states that the taxing consent does not apply to the 1938 Act because the 1938 Act did not "expressly incorporate" the 1924 Act's taxing authorization. See majority opinion at 13, 17. Such a result plainly contravenes the principle that once having found no implied repeal, it is the court's obligation to read the statutes together and give effect to both. Morton

v. Mancari, 417 U.S. at 551; Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-134 (1974); see Nebraska Public Power District v. 100.95 Acres of Land, 719 F.2d 956 (8th Cir. 1983); Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir. 1982), cert. denied, ____ U.S. ____, 77 L.Ed.2d 298 (1983). The majority's holding also neglects the related rule that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." Morton, 417 U.S. at 550-551. The 1938 Act is a general leasing statute and the specific taxing provision of the 1924 Act should be read into it, rather than nullified. See Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

By implication, the majority relies on the Tribe's argument that this court

should follow the canon of construction which provides that ambiguities in statutes are to be resolved in favor of the Indian tribes. See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). The taxing authorization in the 1924 Act is, however, unambiguous. This "canon of construction is not a license to disregard clear expressions of . . . congressional intent." DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); accord, Andrus v. Glover, 446 U.S. 608, 619 (1980). Nor does the 1938 Act create any ambiguity. It is silent on the repeal of the 1924 Act. Use of this canon of construction would require the court to amend the 1938 Act to expressly limit the 1924 Act. That, however, goes beyond a liberal interpretation of an ambiguous clause or phrase and entails legislating by the judicial branch. This

we may not do. Shields v. United States, 698 F.2d 987, 990 (9th Cir.), cert. denied, ____ U.S. ____ , 78 L.Ed.2d 86 (1983); see Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978).

In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), the Supreme Court was faced with a similar situation. In that case the Court upheld Montana's right to tax oil and gas production on the Blackfeet Reservation pursuant to the 1924 Act. The non-Indian oil producer argued that two other statutes, the Act of June 30, 1919, 41 Stat. 3, 16, 17, and the Act of September 20, 1922, 42 Stat. 857, specifically governed the leasing of minerals on the Blackfeet Reservation. These provisions were silent on the subject of state taxation and, it was argued, the

1924 Act therefore did not apply. The Court, however, read all the acts together as one law and approved state taxation under the 1924 Act. 299 U.S. at 166. This court should do the same. While the 1938 Act replaced the 1924 Act's leasing provisions, the taxing authorization was left intact and must be read as effective along with the 1938 Act. <u>See</u> <u>Yellowfish</u>, 691 F.2d at 930.

The question is not whether the 1938 Act "expressly incorporated" the 1924 Act, but whether the 1924 Act's taxing authorization applies under its own terms to leases entered into under the 1938 Act. The language of the 1924 Act and the construction of it by the Supreme Court show that it is applicable. By its plain language, the 1924 Act applies to "unallotted land on Indian reservations other than the lands of the Five

Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to Section 3 of the Act of February 28, 1891. . . ." The Act then provides that "the production of oil and gas and other minerals <u>on</u> <u>such</u> <u>lands</u> may be taxed by the state. . . ." (Emphasis added). "Such lands" clearly aplies [sic] to unallotted lands subject to lease under the 1891 Act. Lands subject to lease under the 1891 Act are those "lands occupied . . . by Indians who have bought and paid for the same, and which lands are not needed for farm or agricultural purposes. . . ." In <u>British-American</u> <u>Oil</u>, the Supreme Court construed this language to include not only "lands acquired by Indians through the payment of a consideration in money, but equally

including lands reserved for Indians in return for cession or surrender by them of other lands, possessions or rights." 299 U.S. at 164. The Court relied on Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 P. 348 (1896), and uniform administrative practice to support its construction of "bought and paid for":

> It has been repeatedly ruled that Indians who are in possession of lands that have been given to them by the United States, for permanent occupancy, where Congress has recognized the right and title of the Indians to such lands, holds said lands as purchasers having paid for the same, in the sense in which the words "have paid for the same" are used in the Act of 1891.

Opinion of the Assistant Attorney General, cited in 25 Land Dec. 408, 412 (1897); see Strawberry Cattle Co., 45 P. at 350-351.

The Tribe argued, and the majority impliedly accepts, that the use of the term "such lands" in the 1924 Act should limit the tax authorization to leases made pursuant to the 1891 or 1924 Acts. We think the plain meaning of the 1924 Act cannot be so narrowly constricted. The term "such lands" addresses generally the property which may be leased. It does not refer only to those leases in which the 1891 or 1924 Acts are cited as authority. In British-American Oil, the Supreme Court concluded that the 1924 Act authorized taxation of oil and gas leasing on the Blackfeet Reservation. In addition, Felix Cohen construed the 1924 Act as applying to unallotted reservation land. Handbook of Federal Indian Law, supra, at 257. The 1938 Act leases at issue here involve unallotted land. The language of the 1924 Act's taxing

authorization is broad, and it plainly applies.[1]

I also disagree with the majority's rejection of the long and consistent Department of Interior interpretation that the 1938 Act did not affect the right of the states to tax. First, from 1938 to 1956 the Department of Interior acquiesced in state taxation of mineral production, notwithstanding the existence of the 1938 Act. Since Interior sponsored the 1938 Act, it certainly could have put an end to state taxation of mineral extraction if it intended the 1938 Act to have that effect. Then, in 1956, the Solicitor for the Department of

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1 Mr. Cohen also made no mention of any loss of effectiveness of the 1924 Act's authority for state taxation due to the 1938 Act. At the time of the 1942 publication of his Handbook, Mr. Cohen was an assistant Solicitor in the Department of Interior. Mr. Cohen, who

Interior explicitly found that the 1938 Act did not affect the 1924 Act's taxing authorization. In 1966, the Solicitor affirmed this position. It was not until 1977 that the Department reversed its position. 84 Interior Dec. 905. The majority follows that later decision in holding that taxation is permitted only for leases entered under the authority of the 1924 and 1891 Acts. This later interpretation, however, overturned a long-standing and consistent administrative construction of the law, and is not entitled to any substantial deference. Watt v. Alaska, 451 U.S. 259, 272-273

(Footnote 1 continued) died in 1953, was also this country's preeminent authority on Indian law. Presumably, he was well aware of the intent underlying the 1938 Act and surely he would have been aware of any loss of effectiveness of the 1924 Act due to the operation of the 1938 Act. Perhaps that is why the Department of Interior consistently upheld state taxation of mineral resources until 1977.

(1981); Red Lion Broadcasting Co., 395 U.S. at 381.

Instead, this court should rely on the Department's prior consistent interpretation of the 1924 and 1938 Acts. It is true, as the majority states, that the prior announcements of the Department were not contemporaneous with the passage of the 1938 Act. Also, they were informal opinions. Nonetheless, they are still entitled to deference from the courts. See Rice v. Rehner, ___ U.S. ___, 77 L.Ed.2d 961, 976-977 & n.13 (1983); Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 432 (9th Cir.1967), cert. denied, 389 U.S. 1046 (1968). Moreover, they most likely were the result of what the Department thought was plainly the law, i.e., the 1938 Act had no effect on the power of the states to tax mineral resource extraction on

unallotted land because it did not expressly repeal the 1924 Act.

If Congress had intended to limit the taxing authorization of the 1924 Act, it would have done so expressly. Surely, there would have been at least some protest from the representatives of the western states, to which the taxation of mineral resources is so important, if the 1938 Act was intended to have such effect. No such protest can be found in the history of the passage of the 1938 Act.

For the preceding reasons, I would affirm the district court.[2]

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2 The Act of March 3, 1927, 44 Stat. 1347, codified at 25 U.S.C. §§ 398a-e, permits the state taxation of mineral resource extraction on unallotted executive order reservation land. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The majority fails to point out that its holding would have a like effect on the continued effectiveness of the 1927 Act, which was modeled largely on the 1924 Act.

APPENDIX B

THE BLACKFEET TRIBE OF INDIANS,

Plaintiff-Appellant,

v.

WILLIAM A. GROFF, Director,
Montana Department of Revenue,
STATE OF MONTANA;
GLACIER COUNTY, Montana; and
PONDERA COUNTY, Montana,

Defendants-Appellees.

No. 81-3041

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

On Appeal from the United States
District Court for the
District of Montana
The Honorable Paul G. Hatfield,
District Judge, Presiding
Argued and submitted February 3, 1982
Decided Dec. 14, 1982

Before: SNEED, ANDERSON, and REINHARDT, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

The Blackfeet Tribe of Indians (the "Tribe") filed suit seeking equitable relief against state taxation of oil and

gas production undertaken by the Tribe's non-Indian lessees on the Blackfeet Reservation. Named as defendants were William Groff as Director of the Montana Department of Revenue, the State of Montana, Glacier County, Montana, and Pondera County, Montana (all simply the "State"). The district court, the Honorable Paul G. Hatfield presiding, granted the State's motion for summary judgment.[1] We affirm.

I. BACKGROUND

The Blackfeet Tribe, under the supervision of the Department of the Interior, is the lessor of 125 parcels of tribal land for oil and gas mining

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1 The district court opinion is reported at 507 F.supp. 446 (D. Mont. 1981.)

purposes. The Tribe is the beneficial owner of the mineral rights in issue. The United States holds the legal title in trust for the Tribe. The lessees (or "producers") are not Indian or Indian-owned entities. The Tribe receives royalty payments based on the amount of oil and gas produced. Oil and gas leasing on the reservation began in 1932 and has continued until the recent past.

Four Montana taxing statutes are at issue.[2] One has been in force at all

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2 The Montana taxing statutes are:

(1) The Oil and Gas Conservation Tax, § 82-11-131, M.C.A. (formerly § 60-145, R.C.M. 1947);

(2) The Resource Indemnity Trust Tax, § 15-38-104, M.C.A. (formerly § 84-7006, R.C.M. 1947);

times relevant to this action. Two were enacted in the 1970's and the other in 1953. All four statutes tax different aspects of the production of the oil and gas extracted by the non-Indian lessees. The Tribe admits it has not paid any of these taxes directly to the State; the producers have paid the taxes. The Tribe asserts, however, that the producers have deducted the Tribe's share of taxes from the royalty payments.

(Footnote 2 continued)

(3) The Oil and Gas Severance Tax, § 15-36-101, M.C.A.

(4) The Oil and Gas Net Proceeds Tax, § 15-23-601, et seq., M.C.A. (formerly § 84-7201, et seq., R.C.M. 1947).

The Tribe brought this action in 1978. Both the Tribe and the State moved for summary judgment. The district court granted summary judgment in favor of the State.

II. DISCUSSION

District Judge Hatfield based his grant of summary judgment on the belief the 1924 Act authorized state taxation of reservation oil and gas production; because the 1924 Act authorized the taxes at issue, it was unnecessary to reach the issue of whether the legal incidence of the tax is on the Tribe. The Tribe argues on appeal that the 1924 Act is no longer in effect and the incidence of the tax adversely impacts its inherent right of sovereignty. As this appeal is from a summary judgment, our review is the same as that of the trial court. National Industries, Inc. v. Republic National

Life Ins. Co., 677 F.2d 1258, 1265 (9th Cir. 1982). Few, if any, facts are in dispute. Virtually all issues are legal and involve the often difficult questions of jurisdiction in Indian Country.

A. Congressional Authorization to Tax.

A state's power to tax transactions arising in Indian Country is severely limited. This is especially true when Indian interests are affected. Thus, it was early established that the states could not tax Indian trust property. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867). More recently, it has been held that the states may not tax the income earned by tribal members on the tribe's reservation, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L.Ed.2d, 129, 93 S.Ct. 1257 (1973), the personal property of tribal members, Bryan v.

Itasca County, 426 U.S. 373, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976), or sales involving tribal members, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976), and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980).

State jurisdiction over the affairs of non-Indians in Indian Country often presents more difficult issues. Such jurisdiction must usually be analyzed in terms of federal preemption and/or the Tribe's limited right of sovereignty. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 65 L.Ed.2d 665, 672, 100 S.Ct. 2578 (1980). If the state taxation of non-Indians in Indian Country is not preempted, Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685,

14 L.Ed.2d 165, 85 S.Ct. 1242 (1965), it may be upheld if the state's interest in taxing the non-Indians is substantial and outweighs the sovereignty interest of the tribe. See Confederated Colville Tribes, supra, 447 U.S. 134, 65 L.Ed.2d 10.

The major exception to the limited power of the states to tax Indian or non-Indian interests in Indian Country is when there is an express authorization by Congress for the tax. See Bryan v. Itasca Country, supra, 426 U.S. 373, 48 L.Ed.2d 710, and McClanahan v. Arizona State Tax Commission, supra, 411 U.S. 164, 36 L.Ed.2d 129. The district judge found, and the State argues, such authorization exists. Our task, then, is to determine whether Congress has evinced its consent to the taxes at issue.

We have little difficulty finding such consent in the Act of May 29, 1924,

43 Stat. 244 (the "1924 Act"). This statute, currently codified at 25 U.S.C. § 398, amended the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 397.[3]

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3 The 1891 Act provides:

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: <u>Provided</u>, That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may

The 1891 Act authorized the leasing of

(Footnote 3 continued) recommend, subject to the approval of the Secretary of the Interior.

The 1924 Act states in full:

<u>Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled</u>, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: <u>Provided</u>, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are

tribal property for grazing and mining purposes, within certain specified regulations. The 1924 Act includes a specific procedure for oil and gas leasing and provides in part:

> That the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands. . . .

The 1924 Act's authorization of state taxation of oil and gas production and

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(Footnote 3 continued) located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

net proceeds under tribal leases on the Blackfeet Reservation was upheld in British-American Oil Prod. Co. v. Board of Equalization of Montana, 299 U.S. 159, 81 L.Ed. 95, 57 S.Ct. 132 (1936).

B. Effect of the Act of 1938

The Tribe contends the 1924 Act's tax authorization was abrogated by the Act of May 11, 1938, 52 Stat. 347, codified at 25 U.S.C. §§ 396a-396g (the "1938 Act").[4] The 1938 Act did not

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4 The 1938 Act provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such

(Footnote 4 continued) Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil-and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe. Such advertisements shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

(Footnote 4 continued) SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such lands or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

expressly repeal the 1924 Act.[5] While we recognize the 1938 Act was an attempt to provide uniformity in an area which has been described as a "patch-work

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(Footnote 4 continued) SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act or parts of Acts inconsistent herewith are hereby repealed.

5 The 1938 Act contains a general repealer. See Section 7 of the 1938 Act reproduced in footnote 4. Generally, the presence of a general repealer is not considered a strong indication that all prior law on the subject is meant to be repealed. 1A Sutherland Statutory Construction § 23.08 (4th Ed. 1972). In fact, a general repealer has been construed to imply "very strongly that

state," F. Cohen, Handbook of Federal Indian Law, 328 (1942 Ed.), we cannot agree with the Tribe that this act impliedly repealed the 1924 Act's tax authorization.[6]

(Footnote 5 continued) there may be acts on the same subject which are not thereby repealed." Hess v. Reynolds, 113 U.S. 73, 79, 28 L.Ed. 927, 929, 5 S.Ct. 377 (1885); Sutherland, supra, § 23.08.

6 But cf. Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), amended, 665 F.2d 1390 (1982), cert. denied, 51 U.S.L.W. 3281 (10/12/82). In Crow Tribe, this court held the Tribe had stated a cause of action in its suit to enjoin state taxation of the Tribe's non-Indian lessees of coal rights. In so holding, the court stated in dictum the 1938 Act "probably" repealed the prior leasing statutes, apparently including the 1924 Act and its tax authorization. 650 F.2d at 1112, fn. 10. For two reasons, we refuse to follow that conclusion. First, the 1924 Act's tax authorization applies only to oil and gas leasing, not coal, so this issue was not before the court. Second, Crow Tribe is a pleading case and any statements beyond those necessary to sustain upholding the Tribe's statement of a cause of action are dicta.

At the outset, we note the opinion in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 71 L.Ed.2d 21, 102 S.Ct. 894 (1982), while not dispositive, offers support for our conclusion the 1938 Act did not repeal the 1924 Act. In Merrion, the Court upheld the right of the Jicarilla Apache Tribe to tax oil and gas production on its reservation. New Mexico had in existence its own oil and gas production taxes pursuant to the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-e. The 1927 Act's main purpose was to extend the 1924 Act's coverage to executive order reservations. See, F. Cohen, Handbook of Federal Indian Law, 534 (1982 Ed.) The Court noted in Merrion that it was not deciding the issue whether the state could tax oil and gas production through leases entered under the 1938 Act. 455 U.S. at ___, 71

L.Ed.2d at 38, fn. 17. Nonetheless, the Court treated the 1927 and 1938 Acts as a composite whole and made no indication the state lacked the authority to tax. We believe a similar analysis should apply to the 1924 and 1938 Acts.

The 1938 Act attempts to make uniform the law governing the leasing of tribal (unallotted) lands for mineral purposes. Letter from Charles West, Acting Secretary of the Interior, to the House Committee on Indian Affairs, June 17, 1937, reprinted in H. R. Rep. No. 1872, 75th Cong., 3d Sess. (1938); S. Rep. No. 985, 75th Cong., 1st Sess. (1937). It does so by regulating the leasing of all minerals, not solely certain types of mineral leasing. 25 U.S.C. § 396a. It also regulates the procedures for entering a lease and allows the Department of Interior to

issue rules to that effect. 25 U.S.C. § 396d. The legislative history also makes it clear the 1938 Act was designed to further the purposes of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479. Letter from Charles West, supra. The Reorganization Act was quite clearly an effort to reverse the assimilation policies of the Allotment Acts and to encourage Indian self-government. See Fisher v. District Court, etc., 424 U.S. 382, 387, 47 L.Ed.2d 106, 111 96 S.Ct. 943 (1976). The 1938 Act furthers these goals by giving tribes more control over the decisions to lease and by streamlining the leasing process to secure a higher economic return to the tribes.

Against the policy and scope of the 1938 Act, we must balance the long-recognized rule that repeals by

implication are strongly disfavored. Morton v. Mancari, 417 U.S. 535, 549, 41 L.Ed.2d 290, 300, 94 S.Ct. 2474 (1974); Posadas v. National City Bank, 296 U.S. 497, 503, 80 L.Ed. 351, 355, 56 S.Ct. 349 (1936). As explained by the Supreme Court in Posadas:

> There are two well-settled categories of repeal by implication--(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But in either case, the intention of the legislature to repeal must be clear and manifest. . . .

296 U.S. at 503, 80 L.Ed. at 355 (Emphasis added).

We see no "irreconcilable conflicts" in the language of the 1924 Act and the 1938 Act. There is no doubt the

two statutes are capable of coexistence. The 1938 Act primarily uses and expands the oil and gas leasing procedures outlined in the 1924 Act and applies them to all leases. Section 1 of of [sic] the 1938 Act, 25 U.S.C. § 396a, reiterates much of the language of the 1924 Act regarding tribal council consent, BIA approval, and a general ten-year durational limit on the leases. Section 2 of the 1938 Act, 25 U.S.C. § 396b, expands on the 1924 Act's public auction requirements. The 1938 Act is silent regarding taxation. The language of the statute does not evince a clear indication that repeal of the taxing authorization was intended. On its face, taxation of oil and gas production is quite compatible with the 1938 Act.

Nor does the legislative history supply the necessary showing of intent.

It is true, as the Tribe argues and we have noted, the 1938 Act was an effort to make uniform the leasing laws and to bring them into harmony with the policies of the Indian Reorganization Act. The terms of the 1938 Act make it evident, however, it was the intent of Congress to supply uniformity by placing the leasing of mineral rights other than oil and gas within a statutory framework similar to that provided for in the 1924 Act. _See_ Letter from Charles West, _supra_. Also, to bring leasing into harmony with the Reorganization Act, the drafters of the 1938 Act attempted to create a system which would provide the tribes with the "greatest return on their property." _Id_. Apparently, the drafters of the bill believed the new act would streamline the leasing process and thereby increase the availability of

leases for all types of minerals.[7] The streamlined process, however, was substantially derived from the 1924 Act. Neither the language of the statute nor the legislative history persuades us that there is an irreconcilable conflict or repugnancy between the 1924 and 1938 Acts.

The only possible conflict between the 1924 and the 1938 Acts involves the Reorganization Act's self-determination and self-sufficiency policies.

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7 In addition to being in a "patch-work state," some leasing statutes mandated following the general mineral leasing laws used on public domain lands. This procedure created "long delay and quite an expense to an applicant for a lease." Letter from Charles West, supra.

Arguably, these policies conflict with the continued authorization of state taxation which might tend to reduce tribal income. This possible conflict, however, must be viewed in light of another Reorganization Act policy which was the desire to encourage tribes "to enter the white world on a footing of equal competition." Statements of Rep. Howard, 78 Cong. Rec. 11732, quoted in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152, 36 L.Ed.2d 114, 121, 93 S.Ct. 1267 (1973); see also Fort Mojave Tribe v. San Bernadino [sic] County, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983, 52 L.Ed.2d 377, 97 S.Ct. 1678 (1977). State taxation is one of the realities of an equal footing. We do not believe this possible policy conflict rises to the

level of irreconcilability required to constitute an implicit repeal.[8]

Even though the 1938 Act is a more comprehensive and general statute than the 1924 Act, a fact which sometimes will lead to a finding of an implied repeal of the earlier act; Posadas, supra, 296 U.S. at 503, 80 L.Ed. at 355, we still do not find there to be the requisite conflict. This conclusion is supported by the rule that "[w]here there is no clear intention

8 We believe this arguable policy conflict in the 1938 and 1924 Acts is found primarily through the benefit of hindsight. While the intent of the 1938 Act makes clear the belief the tribes would be able to secure revenue through mineral leasing, we doubt Congress or the Department of Interior had any idea mineral resources on reservations would rise to the level of importance they have today. It is the current import of those resources which makes taxation such a critical issue at present. In our analysis of the 1938 Act, however, our primary emphasis must focus on the intent of Congress at that time, not on the present.

otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment." Morton, supra, 417 U.S. at 550-551, 41 L.Ed.2d at 301.

The Tribe argues the canon of construction which provides that ambiguities in statutes are to be resolved in favor of the Indians applies to this case. See, e.g., Bryan v. Itasca County, supra, 426 U.S. at 392, 48 L.Ed.2d at 723. We cannot agree. The 1924 Act's tax authorization is unambiguous. This "canon of construction is not a license to disregard clear expressions of . . . congressional intent." DeCoteau v. District County Court, 420 U.S. 425, 447, 43 L.Ed. 300, 315, 95 S.Ct. 1082 (1975); Andrus v. Glover, 446 U.S. 608, 619, 64 L.Ed.2d 548, 558, 100 S.Ct. 1905 (1980). Nor

does the 1938 Act create any ambiguity. It is silent on the repeal of the 1924 Act. The Tribe's use of this canon of construction would have us amend the 1938 Act to include an express repeal of the 1924 Act. That, however, would be going beyond a liberal interpretation of an ambiguous clause or phrase to the point of judicial legislating. This we will not do. See Fry v. United States, 557 F.2d 646, 649 (9th Cir. 1977), cert. denied, 434 U.S. 1011, 54 L.Ed.2d 754, 98 S.Ct. 722 (1978).

Additionally and perhaps most importantly, there has been a long-term administrative interpretation upholding the right of states to tax oil and gas production on the reservations notwithstanding the silence of the 1938 Act. This, outside compelling reasons otherwise, is sufficient to support the

continued validity of the 1924 Act. See Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 432 (9th Cir. 1967), cert. denied, 389 U.S. 1046, 19 L.Ed.2d 838 (1968); Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978); Castillo-Felix v. Immigration and Naturalization Service, 601 F.2d 459, 465 (9th Cir. 1979). Beginning in 1943, the Department of Interior interpreted the 1924 Act to be of continued effectiveness despite the 1938 Act. Several supporting interpretations were made until a contrary interpretation was issued in 1977. See 84 Interior Dec. 905 (1977) and its references to the prior opinions. Generally, the construction of a statute by the agency charged with its administration is entitled to great weight, especially when, as here, Congress has refused to alter the

administrative interpretation. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381, 23 L.Ed.2d 371, 384, 89 S.Ct 1794 (1969). The contrary interpretation by the Solicitor of the Department of Interior in 1977 does not change the result in this case. Unless the original interpretation of the statute by the Department was clearly wrong, which we do not believe to be true, it is not appropriate for the Department to reverse its long held construction of a statute. See United States v. Leslie Salt Co., 350 U.S. 383, 396, 100 L.Ed. 441, 451, 76 S.Ct. 416 (1956); Power Brake Equipment Company v. United States, 427 F.2d 163, 164 (9th Cir. 1970); Red Lion, supra, 395 U.S. at 381, 23 L.Ed.2d at 384. Furthermore, the presumption against repeal by implication, the long

and consistent interpretation by the Department of Interior, and congressional acquiescence in that interpretation all lead to the conclusion the 1977 opinion is erroneous.

We hold, then, that the 1924 Act and its authorization to tax reservation oil and gas production was not implicitly repealed by the 1938 Act.

C. Leases Under the 1938 Act

The Tribe contends that even if the 1924 Act is not found to be repealed by the 1938 Act, 113 of the leases in question were entered pursuant to the 1938 Act; therefore, the 1938 Act controls and it does not contain an authorization to tax. For the following reasons, we reject this argument.

Most, if not all, of what has been said concerning the implied repeal of the 1924 Act applies with equal force to the

Tribe's contention. Having found the 1924 Act to still be in force, we would be remiss to find it lacked any effect. "When two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Morton, supra, 417 U.S. at 552, 41 L.Ed.2d at 301; Radzanower v. Touche Ross & Co., 426 U.S. 148, 48 L.Ed.2d 540, 96 S.Ct. 1989 (1976).

Furthermore, the fact the leases were made pursuant to the 1938 Act does not affect the State's power to tax. The critical aspect is the State's authorization to tax, not the statute under which the leases were made. In any event, both statutes purport to regulate leasing on the same lands--unallotted

reservation property.[9] It is not a strain on our reasoning to find the two acts have a concurrent, cumulative, and compatible effect. We hold, therefore, the 1924 Act's taxing authorization applies with equal force to leases made pursuant to the 1938 Act.

III. CONCLUSION

We find the 1924 Act to permit Montana to tax oil and gas production on the Blackfeet Reservation. The 1938 Act did not impliedly repeal the 1924 Act and its authorization for the taxes at issue.

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9 While the 1924 Act, through its predecessor the 1891 Act, does not use the same language to describe the lands to which it applies as the 1938 Act, the 1924 Act has been construed to have had the same coverage as the 1938 Act. British-American Oil Prod. Co., supra, 299 U.S. at 164.

The decision of the district court is AFFIRMED.[10]

10 Judge Reinhardt concurs in the result, but was unable to participate in the preparation or approval of this Opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

THE BLACKFEET TRIBE OF INDIANS,

Plaintiff,

vs.

STATE OF MONTANA, et al.,

Defendants.

NO. CV-78-61-GF

M E M O R A N D U M

[Filed Jan. 6, 1981.]

In this action the Blackfeet Tribe of Indians challenge five Montana taxation statutes. The Tribe seeks declaratory relief, with injunctive enforcement, from the state's statutes. These statutes authorize the state or county to levy and collect taxes from oil

and gas production. The parties have filed cross motions for summary judgment, filed appropriate memoranda and the matter is ripe for disposition. Jurisdiction is invoked pursuant to 28 U.S.C. §1362, 28 U.S.C. §§2201 and 2202. For the reasons stated below the taxes challenged herein are valid. There being no genuine issue as to any material fact, summary judgment shall be entered in favor of defendants.

FACTS

Plaintiff, the Blackfeet Indian Tribe (hereinafter the "Tribe"), is a tribe of American Indians duly organized pursuant to the Indian Reorganization Act, 25 U.S.C. §461, et seq. The Tribe is the beneficial owner of oil and gas which lies beneath its reservation in Montana. Title to the oil and gas is held by the United States in trust for

the Tribe. Certain oil and gas leases have been executed between the Tribe and various non-Indians allowing for the production of oil and gas on the Blackfeet Indian Reservation. Under the facts alleged here the lessor is the Tribe and the lessee is a non-Indian oil and gas producing entity.

The defendants in this action, the State of Montana and the counties of Glacier and Pondera, impose, levy and collect various taxes on the production of oil and gas within the State of Montana in a non-discriminatory manner pursuant to various Montana statutes.[1]

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1 The following are the Montana statutes challenged:

1. The Oil and Gas Conservation Tax, §82-11-131, M.C.A. (formerly §60-145, R.C.M. 1947);

The Blackfeet Tribe has entered into many oil and gas production leases with non-Indian lessees. Since neither the Tribe nor any single member of the Tribe produces any of the oil and gas, they receive a royalty fee from the non-Indian lessee. It is agreed that any and all taxes collected by the state defendants from the production of oil and gas within

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(Footnote 1 continued)

2. The Resource Indemnity Trust Tax, §15-38-104, M.C.A. (formerly §84-7006, R.C.M. 1947);

3. The Producers License Tax, §84-2202, R.C.M. 1947, repealed July 1, 1975 and replaced by the Oil and Gas Severance Tax on July 1, 1975;

4. The Oil and Gas Severance Tax, §15-36-101, M.C.A.

5. The Oil and Gas Net Proceeds Tax, §15-23-601, et seq., M.C.A. (formerly §84-7201, et seq., R.C.M. 1947).

the Blackfeet Indian Reservation have been paid to the state by non-Indian lessees engaged in the business of producing oil and gas. There have been no liens or encumbrances placed on any tribal property as a result of the taxation statutes. The Montana statutes also provide that in the absence of lease provisions to the contrary, the producer may reduce the royalty fee by a prorata share of the cost of the tax. See §15-38-104, M.C.A. (Resource Indemnity Trust Tax); §15-36-101(4), M.C.A. (Oil and Gas Severance Tax); §15-23-607(3), M.C.A. (Oil and Gas Net Proceeds Tax).

Without determining whether the legal incidence of these taxes fall upon the non-Indian lessee or the Tribe as lessor of the property, it is possible for the legal incidence of the tax sought to be imposed to fall on the Indians.

However, that legal determination need not be made for the purposes of this summary judgment ruling. See Footnote 2, infra.

With the foregoing as a factual background, a review of the applicable federal law is in order.

FEDERAL STATUTES

By an act of Congress dated February 28, 1891, hereinafter the "1891 Act", found in 25 U.S.C. §397, the federal government authorized mineral leases of Indian land under such terms and conditions as the Tribe might recommend, subject to the approval of the Secretary of Interior. By an act dated May 29, 1924 (now codified 25 U.S.C. §398), hereinafter the "1924 Act", Congress authorized mineral leases for oil and gas and authorized states to tax the production of the same so long as no

lien or charge of any kind or character could encumber the land of the Indian owner. The statute provides in full:

> Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under §3 of the Act of February 28, 1891 (25 U.S.C.S. §397), may be leased at public auction by the Secretary of the Interior, with the consent of the Council speaking for such Indians for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil or gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: provided, that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interest on said lands: provided, however, that such tax shall not become a lien or

> charge of any kind or character against the land or the property of the Indian owner. (emphasis supplied)

Because of what in effect amounted to a patch-work state of the law governing mineral leases on tribal land, see, HANDBOOK OF FEDERAL INDIAN LAW, Felix S. Cohen, p.328 (1942), Congress enacted comprehensive legislation governing the leasing of tribal lands for mining purposes. An act dated May 11, 1938, hereinafter the "1938 Act", now found in 25 U.S.C. §§396(a) thru 396(f), was passed which imposed various procedural standards for leasing unallotted Indian lands for mining purposes. That mining act provided in pertinent part:

> §396(a)...Unallotted lands within any Indian reservation ...may, with the approval of the Secretary of Interior, be leased for mining purposes, by authority of the Tribal Council..., for terms not to

> exceed ten years and as long thereafter as minerals are produced in paying quantities.

§396(b) provided in pertinent part

> ...Leases for oil -- and/or gas mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of Interior may prescribe....

§396(c) provided

> ...Lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of Interior, guaranteeing compliance with the terms of their leases: . . .

§396(d) provided

> All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of Interior....

§396(e) provided

> The Secretary of Interior may, in his discretion, authorize superintendents or other officials in the Indian service to approve leases for oil, gas, or other mining purposes covering any restricted Indian land, tribal or allotted.

§396(f) dealt with exceptions concerning certain Indian reservations not of relevance here. The 1938 Act also included a general repealing clause that all acts or parts of the acts inconsistent herewith are hereby repealed. See, §7 of the Act of May 11, 1938.

ANALYSIS

Plaintiff's argument essentially asserts that the Blackfeet Tribe has an inherent right to be free from taxation by the State of Montana and two of its counties. The United States Supreme Court has on occasion ruled that the

state general taxing powers cannot be thrust upon the Indians, the Tribes or their property absent congressional authorization. See, Bryan v. Itasca County, 426 U.S. 373 (1976); Confederated Salish and Kootenai Tribes v. Moe of the Flathead Reservation, 425 U.S. 463 (1976); McClanahan v. Arizona State Tax Comme., 411 U.S. 164 (1973); British-American Oil Producing Company v. Board of Equalization of Montana, 299 U.S. 159 (1936). Historically, Indians have been found to be exempt from taxes on Indian ownership and activity confined to the reservation. However, those same U. S. Supreme Court opinions have consistently recognized that Indian sovereignty in this regard is dependent upon congressional preservation. See also, U.S. v. Wheeler, 435 U.S. 313, 323 (1978).

Congress may at anytime authorize the state to tax Indian property or activities so long as any state tax authorized by Congress is a non-discriminatory exercise of state sovereign authority. Thus absent discriminatory state action which is prohibited by the Indian commerce clause, the question is only one of congressional intent. Either Congress intended to allow the state to exert its taxing authority or it did not. With the traditional assumption of Indian sovereignty as a backdrop, a review of the relevant statutes is necessary to determine whether this historical immunity has been altered by Congress.

A plain reading of the 1924 Act clearly authorized state taxation of production of oil and gas and other minerals. The Act states in part:

> ...provided, that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of Interior is authorized and directed to be paid the tax so assessed against the royalty interests on said lands: . . .

Therefore, absent an express or an implied repeal Congress has clearly expressed an intent to allow the state to impose their inherent taxing power.

A review of subsequent congressional legislation reveals no federal statute expressly showing a departure from the view that the states have the power to tax oil and gas extraction. The Tribe agrees with this but argues that the 1924 Act has been impliedly repealed by the 1938 Act dealing with the leasing of unallotted Indian lands for mining purposes.

A cardinal rule of statutory construction is that repeals by implication are not favored. Morton v. Mancari, 417 U.S. 535 (1974); Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). Furthermore, the principle that repeals by implication are not favored carries special weight when the court is urged to find that a specific statute has been repealed by a more general one. U.S. v. United Continental Tuna Corp., 525 U.S. 164 (1976); see, also, Bradley v. Kissinger, 418 F.Supp. 64 (D.C. 1976).

Repeal by implication is possible when there is a positive repugnancy between two statutes or where the legislature's intent to repeal is clear and manifest. Wilderness Society v. Morton, 479 F.2d 842 (C.A.D.C. 1973), cert. denied, 411 U.S. 917 (197) [sic]; Accord, Southwestern Financial Corp. v.

Smith, 379 F.Supp. 649, rev'd on other grounds, 542 F.2d 278 (19) [sic]; U.S. v. Pacelli, 491 F.2d 1108 (C.A.N.Y. 1974), cert. denied, 419 U.S. 826 (19) [sic]. Thus if provisions in two separate acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of an earlier act. In addition, if a latter act covers the whole subject of an earlier act and is clearly intended as a substitute, the latter act acts as a repeal of the earlier act, but, in either of these situations the intention of the legislature to repeal must be clear; otherwise the rule of construction is that a latter act is to be construed as a continuation of and not a substitute for the first act. Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971).

The Tribe's major argument for repeal is that the 1938 legislation was intended as a "comprehensive law covering mineral leases on unallotted land." See, F. S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, p.328 (Government Printing Office 1940 ed.).

The 1938 Act, as a comprehensive revision of the existing law, addressed nearly every subject concerning the leasing of Indian lands for mining purposes including oil and gas development. See, 25 U.S.C. §§396(a) thru 396(f). The statute, however, did not address the issue of state taxation of mineral production, nor can any legislative history be found concerning the same. The Tribe argues that because permission to tax was part of the existing mineral leasing law and the new statute was designed to be comprehensive

in nature, Congress impliedly intended to repeal the state's permission to tax. This court disagrees with this line of reasoning.

In the first place, if, as the Tribe contends, Congress chose to completely revise the existing mineral leasing law on tribal lands it could have easily changed the existing tax authorization section. Moreover, the Tribe is unable to point to anything in the legislative history of the 1938 Act which can support this repeal by implication. Nor is there anything irreconcilable between the 1924 Act and the alleged repealing Act of 1938. A much stronger congressional intent than the enactment of a comprehensive leasing act must be made to repeal an earlier act dealing with the same subject which authorizes state

taxation of gas and oil production on tribal lands.

The line of authority for statutory construction is further buttressed by principles of law dealing with uniform administrative practice. Since the passage of the 1938 Act until a November, 1977 legal memorandum from the Assistant Secretary for Indian Affairs, the Department of the Interior has consistently viewed with approval the states' taxing power over production of oil and gas on tribal lands leased by the Tribes. Thus for nearly 40 years the agency charged with interpretation of a congressional statute and the individuals charged with the responsibility of its operation have not disputed the states' taxing authority.

The Tribe has placed great reliance on the memorandum dated November 7, 1977,

in which a Solicitor for the Department of Interior concluded that the 1924 state tax authorization act was impliedly repealed by the 1938 comprehensive leasing act. However, within this memorandum itself, the Solicitor states that there had been at least four opinions written by previous solicitors which upheld and acknowledged the power of the state to tax production of oil and gas from tribal leases. The first such opinion by a Solicitor was issued in 1943 and the latest opinion reaffirming the conclusion was in 1966. Inspite of these departmental interpretations, in 1977 a Solicitor issues an opinion which concludes that the previous Solicitor opinions were legally erroneous. This lone opinion then became the foundation by which this litigation attempts to

reverse approximately 40 years of administrative practice.

The persuasiveness of an administrative interpretation of a statute depends upon the thoroughness evident in its consideration, the validity of its reasoning and its consistency with earlier and later pronouncements by the same agency. See, Paden v. U.S. Dept. of Labor, 562 F.2d 470 (7th Cir. 1977). Here, by this 1977 opinion, the Solicitor wishes to reverse what had been approximately 40 years of consistent administrative interpretation. To do so would require compelling indications that prior construction of a statute with those charged with its execution was clearly erroneous. This is especially true when Congress has refused to alter the administrative construction.

See, U.S. v. Radio Television Directors Ass'n., 395 U.S. 367 (1969).

It has been held that where administrative practice has been consistently and generally unchallenged, such interpretation and practice has particular weight when it has been followed by individuals charged with responsibility of its operation; and where such practice is disputed in later years, more weight should be given to interpretations made closer in time to the making of the law being construed. Citizens Band of Potawatonic Indians of Okl. v. U.S., 391 F.2d 614 (U.S. Ct. Cl. 1967), cert. denied, 389 U.S. 1049 (1968).

Applying the above principles to the facts here, the Solicitor's 1977 memorandum loses its persuasiveness because it failed to provide this court

with compelling reason by either legislative history or case law authority to clearly show Congress' intent to repeal the states' historical taxing power.

Since administrative interpretation over many years is entitled to great weight, C.I.R. v. First Sec. Bank of Utah, 405 U.S. 394 (1972), the Tribe is saddled with a particularly difficult burden to show that a statute's construction over many years has been clearly wrong. The Tribe has failed to do this. The court is bound by the plain meaning of the statute, past administrative interpretations and case law all upholding the validity of the statute. See, British-American Co. v. Board of Equalization of Montana, 299 U.S. 159 (1936). In short, the Tribe has

failed to overcome the presumption of this statute's validity.

Next, the Tribe argues that the failure of Congress to state the relationship between the 1924 taxing authority statute and the 1938 Act creates an ambiguity which must be resolved in favor of the Tribe. While this court is in agreement with the assertion that when statutes dealing with Indians are ambiguous, resolution of any ambiguity should be in favor of the Indian position, Bryan v. Itasca County, 426 U.S. 373 (1976), the court finds no ambiguity in the statutes.

The taxing power of the state in the 1924 Act is specific and clear. The fact that a later act was passed dealing with the general leasing scheme of tribal lands does not, without more, repeal or otherwise create an ambiguity which must

be resolved in favor of the Tribe's position. The failure of Congress to clearly repeal a well-known taxing power of the state is, in itself, an intention by Congress to leave the 1924 statute intact. Again this is reinforced by Congress' acquiescence, if you will, to 40 years of consistent statutory interpretation and the clause dealing with repeal of anything inconsistent with the new Act.

Nor does the Indian Reorganization Act, 25 U.S.C. §476, support the contention that the 1938 Act repealed the 1924 Act. The expressed congressional intent in enacting the I.R.A. was to further the achievement of economic independence for the Indian and for the establishment of an effective system of tribal self-government. This court

rejects any argument that the Act did anything to the 1924 Act.

Indeed, the I.R.A. supports a contrary conclusion. It is the purpose of the I.R.A. to allow Indians to enter the economic world on an equal footing; taxation statutes such as these are an economic fact of oil and gas production. Like the court in Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253, 1256 (9th Cir. 1976), when confronted by a similar issue, the court refuses to find that the Indian Reorganization Act supports a tax exemption for non-Indian lessees on Indian land. See also, Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 153-54 (1973).

Finally, it should be pointed out that neither the Tribe's citation to White Mountain Apache Tribe v. Bracker, 48 L.W. 4897 (June 27, 1980), or to

Central Machinery Co. v. Arizona State Tax Commn., 48 L.W. 4904 (June 27, 1980), are in point here. Both cases deal with state taxes which were struck down due to comprehensive federal regulation which preempted state taxes. In neither case was there any express congressional statement authorizing state taxation. In this case, however, we have specific congressional authorization for the state to tax oil and gas production on the Reservation.

Thus there is little or no evidence to support the assertion that the 1938 Act precludes the state from taxing oil and gas production on leased lands owned by the Tribe. The cardinal principle against subsilentio repeal is a rule of interpretation based upon probable congressional intent. Where, as here, there is no congressional signal other

than a subsequent passage of a comprehensive leasing law which neither authorizes nor precludes state taxation of leased lands owned by the Tribe, and coupled with the consistent judicial and administrative interpretation over the last quarter of a century, the court declines to rule that the state is stripped of its historical taxing power.

Therefore, the Montana oil and gas production taxation statutes are valid[2] as applied to the non-Indian lessees within the Blackfeet Indian Reservation. Defendants have shown there is no triable issue of fact and are entitled to summary judgment as a matter of law.

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2 Since the statutes are valid here, I need not reach the question of where the legal incidence of the tax falls. I only pause to note that where, as here, there can be no direct encumbrance on the lessor's interest, and where there is only an indirect economic effect on the Indian lessors, the legal

Accordingly, summary judgment is entered in favor of defendants and against plaintiffs in this action.

DATED this 6th day of January, 1981.

/s/
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

(Footnote 2 continued) incidence of the tax would most likely fall upon the non-Indian lessee. See, Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253, 1256 (9th Cir. 1976), and cases cited therein.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
GREAT FALLS DIVISION

THE BLACKFEET TRIBE OF INDIANS
Blackfeet Indian Reservation
Browning, Montana 59417

Plaintiff,

vs.

WILLIAM A. GROFF
Director, Montana Department of Revenue
Capitol Building, Helena, Montana 59601

STATE OF MONTANA
Governor's Office, Capitol Building
Helena, Montana 59601

GLACIER COUNTY, MONTANA
Court House
Cut Bank, Montana 59412

PONDERA COUNTY, MONTANA
Court House
Conrad, Montana 59425

No. CV-78-61-GF

FIRST AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, AND FOR DAMAGES

Plaintiff, by its attorneys, brings the action against defendants and complains as follows:

I. JURISDICTION

1. This action arises under 11 Stat. 657, 13 Stat. 85, 25 Stat. 113, 25 Stat. 676, 29 Stat. 350, 52 Stat. 347 (25 U.S.C., 396a-396f) and Title 84, Chapters 22, 62 and 70, and Section 60-145, Revised Codes of Montana, 1947. This Court's jurisdiction is based on 28 U.S.C., Sections 1362, 1331, 2201 and 2202. The amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000.00). Venue is based on 28 U.S.C., Section 1391.

II. THE PLAINTIFF

2. Plaintiff Blackfeet Indian Tribe is a tribe of American Indians,

duly organized pursuant to the Indian Reorganization Act, 25 U.S.C. Section 461, et seq., whose governing body, its Tribal Council, is duly recognized as such by the Secretary of the Interior.

III. THE DEFENDANTS

3. Defendant William A. Groff is the duly appointed, qualified and acting Director of Revenue of the State of Montana, and as such officer is the chief administrative officer of the Montana Department of Revenue, and responsible for the levy and collection of taxes on royalty from the production of oil and gas in the State of Montana.

4. The State of Montana is a state of the United States of America created pursuant to the Enabling Act of February 22, 1889 (25 Stat. 676), and levies and collects taxes on royalty from

the production within its borders of oil and gas.

5. Glacier County is a body politic and corporate of the State of Montana, and as such levies and collects taxes on royalty from the production within its borders of oil and gas.

6. Pondera County is a body politic and corporate of the State of Montana, and as such levies and collects taxes on royalty from the production within its borders of oil and gas.

IV. RELEVANT STATUTES

7. 25 U.S.C., Section 398 (May 29, 1924, 43 Stat. 244) provides that unallotted Indian Reservation lands which are subject to being leased for mining purposes under the Act of February 28, 1891 (26 Stat. 795; 25 U.S.C. Section 397), may be leased by the Secretary of the Interior with the consent of the

Indians; and that the royalty from the production of oil and gas from such leased lands may be taxed by the state in which the lands are located as to the leases granted pursuant to the 1891 Act; the Secretary is authorized and directed to cause such taxes to be paid as to the leases granted pursuant to the 1891 Act.

8. 25 U.S.C., Section 397 (February 28, 1891; 26 Stat. 795) permitted the leasing for mining purposes of lands occupied by Indians who have bought and paid for the same.

9. 25 U.S.C., Section 396a (May 11, 1938; 52 Stat. 347), provides:

> Section 396a. Leases of unallotted lands for mining purposes
> Duration of leases
>
> Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of

this Act (25 USCS Sections 396a and note-396g), may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. (May 11, 1938, c. 198, Sec. 1, 52 Stat. 347).

10. From January 1, 1969 to July 1, 1975 Section 84-2202, R.C.M. 1947, as amended, provided for an oil producers' license tax payable to the State of Montana of 2.1% of the gross value of production of oil only up to 450 barrels per lease and 2.65% of the gross value of production of oil only in excess of 450 barrels per lease; and provided also as to leases in existence on January 1, 1969 such tax was to be paid by the producer of the oil for the account of royalty owners, and that as to leases coming into existence after January 1, 1969 royalty

owners should be liable for their pro rata shares of such tax.

11. From and after July 1, 1975 Section 84-2202, R.C.M. 1947, as amended, has provided for a severance, (as opposed to a producers' license) tax payable to the department of revenue for the use of the State of Montana on production of both oil and natural gas, at a graduated rate, with such tax applicable to royalty interests and chargeable to the royalty interest owner unless otherwise provided in the lease or contract under which oil and gas are produced; and providing further that royalty interests that are owned by the federal government shall be exempt from taxation.

12. Throughout the period of time for which claim herein is made, Chapter 62 of Title 84, R.C.M. 1947, provided for a net proceeds tax on royalty from the

production of oil and gas in the State of Montana, which said net proceeds are assessed and taxed by the Montana Department of Revenue, and by the county assessor of the county from which the taxable production is made. Said tax is paid to the county from which the taxable production is made.

13. Chapter 79 of Title 84, R.C.M. 1947 has, since July 1, 1977, provided for a tax on royalty from the production of oil and gas in the State of Montana to provide for the creation of a resource indemnity trust. Said tax is paid to the Montana Department of Revenue.

14. Section 60-145 R.C.M. 1947 provides for a tax on royalty from the production of oil and gas in the State of Montana for the purpose of providing funds for the operation of the Board of Oil and Gas Conservation; said tax is

assessed by said Board and paid to the Montana State Treasurer.

15. Pursuant to the Treaty with Blackfeet of October 17, 1855 (11 Stat. 657) the United States reserved to the Blackfeet Tribe of Indians the exclusive control of a Reservation within the boundaries of the present State of Montana.

16. Pursuant to the Agreement of May 1, 1888 (25 Stat. 113), the Blackfeet Tribe of Indians ceded a portion of its 1855 Treaty Reservation, reserving to itself the portion not ceded.

17. Pursuant to the Agreement of September 26, 1896 (29 Stat. 350) the Blackfeet Tribe of Indians ceded a further portion of its 1855 Treaty Reservation, reserving to itself the portion not ceded.

18. The federal government's exclusive jurisdiction over plaintiff's lands was recognized and assumed by the United States in the Treaty of October 17, 1855 (11 Stat. 657) and by the Organic Act for the Territory of Montana (13 Stat. 85). Section 4 of the Enabling Act of 1889 (25 Stat. 676) enunciated the principle of exclusive jurisdiction by Congress over Indian lands in the State of Montana. Section 2 of Ordinance No. 1, Montana 1889 Constitution, contains a disclaimer of state jurisdiction over Indian lands. Article I, Montana 1972 Constitution, re-affirms the absolute jurisdiction and control of the Congress of the United States over lands owned by Indian tribes.

V. PLAINTIFF'S CONTENTIONS

19. That the 1938 Indian Mineral Leasing Act (25 U.S.C. 396) replaced and

supplanted the 1891 Indian Mineral Leasing Act (25 U.S.C. 397); the 1924 Act (25 U.S.C. 398) consents to state taxation of royalties from leases granted under the 1891 Act only; no Congressional consent has been given to defendants to tax royalties from leases granted under the 1938 Act.

20. That on November 7, 1977, the Solicitor of the United States Department of the Interior rendered an opinion to the Assistant Secretary of the Interior for Indian Affairs that taxation of oil royalties form Fort Peck Indian tribal lands--or lands of other tribes--by the State of Montana from leases granted pursuant to the 1938 Indian Mineral Leasing Act (52 Stat. 347; 25 U.S.C. 396(a)-396(f) was contrary to law, illegal and unauthorized. A copy of said

opinion is attached hereto as Exhibit A and by this reference made a part hereof.

21. That notwithstanding the lack of consent to defendants by the United States Congress to tax plaintiff's royalties, as in paragraph 19 alleged, prior to July 1, 1975 the State of Montana had no statutory authority pursuant to Section 84-2202, or any other Montana statute, to tax plaintiff's royalty from production of natural gas.

22. That notwithstanding the lack of consent to defendants by the United States Congress to tax plaintiff's royalties, as in paragraph 19 alleged, after July 1, 1975 the State of Montana had no statutory authority in any event under Section 84-2202, as amended, to tax plaintiff's royalty from production of both oil and gas, because the statute as amended specifically exempts from the

said severance tax the taxation of royalty interests that are owned by the federal government; that legal title to plaintiff's royalty interests is in the federal government.

23. That upon information and belief plaintiff alleges that defendants have levied and collected taxes on plaintiff's royalty from production, as follows:

(a) Gas produced prior to July 1, 1975, pursuant to Section 84-2202 (Producers' License Tax).

(b) Oil and gas produced after July 1, 1975 pursuant to Section 84-2202 R.C.M. 1947, as amended (Severance Tax).

(c) Oil and Gas produced, pursuant to Chapter 62, Title 84 R.C.M. 1947 (Net Proceeds Tax).

(d) Oil and gas produced, pursuant to Chapter 70, Title 84, R.C.M. 1947 (Resource Indemnity Trust Act).

(e) Oil and gas produced, pursuant to Section 60-145, R.C.M. 1947 (Oil and Gas Conservation Act).

24. That the royalties from plaintiff's lands which are being leased pursuant to the 1938 Indian Mineral Leasing Act (52 Stat. 347; 25 U.S.C. 396(a)-396(f) have been and are being taxed by defendants contrary to law.

25. That notwithstanding the said opinion alleged in paragraph 20 and notice and knowledge thereof, defendants continued to collect taxes on plaintiff's royalty and will continue to do so unless restrained therefrom.

26. That plaintiff has no adequate remedy at law.

27. That for six years last past by reason of the unauthorized and illegal taxation by defendants of the plaintiff's royalty interest in the production of oil and gas from plaintiff's lands, all as herein alleged, plaintiff has been damaged in an amount greatly in excess of ten thousand dollars ($10,000.00), the precise amount of which is better known to defendant.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays:

1. That this Court enter a judgment declaring that no Congressional consent has been given to tax royalties on production from leases granted under the Indian Mineral Leasing Act of 1938 and that defendants, and each of them are prohibited from taxing plaintiff's royalty interests on the production of oil and gas from plaintiff's lands from

leases granted pursuant to the 1938 Indian Mineral Leasing Act.

2. That this Court enter a judgment declaring that notwithstanding defendant's general lack of authority to tax plaintiff's royalty interests in the production of oil and gas from plaintiff's lands, as prayed in paragraph 1, the oil and gas royalties of plaintiff are, also after July 1, 1975, specifically exempt from the tax imposed by defendant the State of Montana's oil and gas severance tax, Section 84-2202, R.C.M. 1947, and the gas royalties of plaintiff are, also before July 1, 1975, exempt from said tax.

3. That this Court enter an Order enjoining defendants, and each of them, from assessing, levying, imposing liens, or in any wise collecting or attempting to collect taxes upon plaintiff's royalty

interests in the production of oil and gas from plaintiff's lands from leases granted pursuant to the 1938 Indian Mineral Leasing Act.

4. That this Court, pending final determination of this complaint, issue a preliminary injunction, restraining and enjoining defendants, and each of them or anyone acting in their places and steads, in the aforesaid manner and form, or in the alternative that it order all such royalties paid into Court pending a final determination of the issues herein.

5. That pending a final decision in this cause, this Court order defendants to pay into Court taxes collected on royalties from plaintiff's leases granted pursuant to the 1938 Indian Mineral Leasing Act (52 Stat. 347).

6. That this Court enter an order requiring defendants, and each of them, to render to plaintiff an accounting of all taxes collected by defendants for six years last past from plaintiff on plaintiff's royalty interests in the production of oil and gas from plaintiff's lands pursuant to leases granted under 25 U.S.C. 396 (57 Stat. 347).

7. That this Court render a judgment for plaintiff for the amount of taxes collected by defendant for six years last past and paid from plaintiff's said royalty interests aforesaid, together with interest at the rate of six percent (6%) per annum.

8. That this Court grant plaintiff such other and further relief as may be just and proper.

DATED this 23rd day of January, 1979.

/s/ John M. Schiltz
for Dale L. McGarvey
745 South Main
Kalispell, Montana 59901

Attorney of Record

APPENDIX E

UNITED STATES STATUTES AT LARGE

Act of Feb. 28, 1891, ch. 383, 26 Stat. 795, codified at 25 U.S.C. § 397

SEC. 3. That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes: Provided, That where lands are

occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

Act of May 29, 1924, ch. 210,

43 Stat. 244, codified at

25 U.S.C. § 398

An Act To Authorize the leasing for oil and gas mining purposes of unallotted lands on Indian reservations affected by the proviso to section 3 of the Act of February 28, 1891.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council

speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil or gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind

or character against the land or the property of the Indian owner.

Act of June 18, 1934, ch. 576, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461-479

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: Provided further, That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur,

as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: Provided further, That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: Provided further,

That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: Provided further, That in the event any person or persons, partnership, corporation, or association, desires a mineral patent, according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: Provided further, That patentee shall

also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917,

creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the

subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: Provided further, That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted

allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian

Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on

the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established

as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous

appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: Provided, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have

the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: Provided, That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole.

Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and

carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets

in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as

hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its

tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor

interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Act of May 11, 1938, ch. 198, 52 Stat. 347, codified as amended at 25 U.S.C. §§ 396a-396g

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

SEC. 2. That leases for oil- and/or gas-mining purposes covering such

unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a

lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the

said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said

Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

SEC. 7. All Act[1] or parts of Acts inconsistent herewith are hereby repealed.

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1 So in original.

APPENDIX F

OIL AND GAS NET PROCEEDS TAX,

MONTANA CODE ANNOTATED,

CHAPTER 15, PART 23

15-23-601. Definitions. As used in this part, the following definitions apply:

(1) "Excise tax" means the windfall profit tax on domestic crude oil imposed by Title I of the federal Crude Oil Windfall Profit Tax Act of 1980, as enacted or as amended.

(2) The terms "operator" and "producer" mean any person who engages in the business of drilling for, extracting, or producing any natural gas, petroleum, or other crude or mineral oil.

(3) The term "well" includes each single well or group of wells, including dry wells, in one field or production

unit and under the control of one operator or producer.

Compiler's Comments

1981 Amendment: Inserted the lead-in phrase and subsection (1) defining "Excise tax".

15-23-602. Statement of sales proceeds. Each operator or producer of natural gas, petroleum, or other crude or mineral oil must on or before April 15 in each year make out and deliver to the department of revenue a statement of the gross sales proceeds of such natural gas, petroleum, or other crude or mineral oil from each well owned or worked by such person during the next preceding calendar year. The gross sales proceeds shall be determined by multiplying the units of production sold from the well times the royalty unit value of that production at the well. Such statement shall be in the form prescribed by the department and

must be verified by the oath of the operator or producer or the manager, superintendent, agent, president, or vice-president of such corporation, association, or partnership. Such statement shall show the following:

(1) the name and address of the operator, together with a list in duplicate of the names and addresses of any and all persons owning or claiming any royalty interest in the production from the well or the proceeds derived from the sale thereof, and the amount or amounts paid or yielded as royalty to each of such persons during the period covered by the statement;

(2) the description and location of the well;

(3) the number of cubic feet of natural gas, barrels of petroleum or other crude or mineral oil sold from the

well during the period covered by the statement;

(4) the gross sales proceeds in dollars and cents or, in the case of sales between parties not acting at arm's length, the greater of the gross sales proceeds from or the fair market value of the products sold;

(5) actual cost of extracting product from well;

(6) cost of construction, repairs, and betterments;

(7) actual cost of fire insurance and workers' compensation insurance;

(8) the amount paid or withheld in satisfaction of liability for excise taxes imposed by the U.S. government on the production, sale, or removal of the natural gas, petroleum, or other crude or mineral oil reported pursuant to subsection (3), including a separate

statement of the amount of such taxes paid or withheld from each royalty owner.

Compiler's Comments

1983 Amendment: In first sentence, after "on or before" changed "March 31" to "April 15"; amendment applicable to reports or returns filed after December 31, 1982.

1981 Amendments: Chapter 425 substituted "sales proceeds" for "yield" in the middle of the first sentence; substituted the second sentence for "and the value thereof" that was at the end of the first sentence; substituted "sold" for "extracted or produced" in (3); substituted language in (4) for "the gross yield or value in dollars and cents".
Chapter 525 added subsection (8).

15-23-603. Net proceeds -- how computed. (1) The department of revenue shall calculate and compute from the returns the gross sales proceeds of the product yielded from such well for the year covered by the statement and shall calculate the net proceeds of the well yielded to the producer, which net proceeds shall be determined by

subtracting from the gross sales proceeds thereof the following:

(a) all royalty paid in cash by the operator or producer and the gross value of all royalty apportioned in kind by the operator or producer that shall be determined by using as the value of a barrel of oil or a cubic foot of gas the average selling price for the calendar year of a barrel of oil or a cubic foot of gas from the well out of which the royalty was paid;

(b) all moneys expended for necessary labor, machinery, and supplies needed and used in the operation and development;

(c) all moneys expended for improvements, repairs, and betterments necessary in and about the working of the well;

(d) all moneys expended for fire insurance and workers' compensation insurance and for payments by operators to welfare and retirement funds when provided for in wage contracts between operators and employees;

(e) 70% of the amount paid or withheld in satisfaction of liability for excise taxes imposed by the U.S. government on the production, sale, or removal of the natural gas, petroleum, or other crude or mineral oil yielded from such well, other than the amount of such taxes paid by or withheld from each royalty owner.

(2) No moneys invested in the well and improvements during any year except the year for which such statement is made may be included in such expenditures, except as provided in 15-23-604, and such expenditures may not include the salaries

or any portion thereof of any person or officer not actually engaged in the working of the well or superintending the management thereof.

Compiler's Comments

1983 Amendment: At beginning of (1)(e), inserted "70% of"; deleted former (2), which read: "The value arrived at under subsection (1) shall be increased by the amount of any refund received from the U.S. government to the extent that the amount refunded was used to reduce the value of the gross products under subsection (1)(e)."

Section 5, Ch. 383, L. 1983, provided that the amendment applies retroactively to production years beginning on or after January 1, 1980.

1981 Amendments: Chapter 425 substituted "gross sales proceeds" for "gross value" in the net proceeds formula in two places in (1); deleted "or apportioned" before "in cash" and "or in kind" after "in cash" near the beginning of (1)(a); added all language after "in cash by the operator or producer" in (1)(a).

Chapter 525 inserted subsections (1)(e) and (2) (now deleted).

15-23-604 omitted.

15-23-605. Assessment of royalties. The amount of royalty received, valued as provided in 15-23-603(1)(a), less 70% of the amount of excise taxes paid by or withheld from the royalty owner as reported pursuant to 15-23-602(8), shall be considered net proceeds to the recipient and shall be assessed as follows: upon receipt of the lists or schedules setting forth the names and addresses of any and all persons owning or claiming royalty and the amount paid or yielded as royalty to such royalty owners or claimants during the year for which such return is made, the department of revenue shall proceed to assess and tax the same as net proceeds of mines.

Compiler's Comments

1983 Amendment: Near beginning of section, after "less" inserted "70% of"; deleted former (2), which read: "The net proceeds to a recipient shall be increased by any refund of an excise tax to the

extent that the amount refunded was used to reduce the value of the royalty received under subsection (1)."

Section 5, Ch. 383, L. 1983, provided that the amendment applies retroactively to production years beginning on or after January 1, 1980.

1981 Amendments: Chapter 425 inserted "valued as provided in 15-23-603(1)(a)" after "The amount of royalty received" near the beginning of the section.

Chapter 525 inserted ", less the amount of excise taxes paid by or withheld from the royalty owner as reported pursuant to 15-23-602(8)," after "royalty received" at the beginning of (1); added subsection (2) (now deleted).

15-23-606 omitted.

15-23-607. County assessors to compute taxes. (1) Immediately after the board of county commissioners has fixed tax levies on the second Monday in August, the county assessor shall compute the taxes on such net proceeds, except as provided in 15-36-121, and royalty assessments and shall deliver the book to

the county treasurer on or before September 15. The county treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law.

(2) The operator or producer shall be liable for the payment of said taxes and same shall be payable by and shall be collected from such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that the operator may at his option withhold from the proceeds of royalty interest, either in kind or in money, an estimated amount of the tax to be paid by him upon such royalty or royalty interest. After such withholding any deviation between the estimated tax and the actual tax may be accounted for by

adjusting subsequent withholdings from the proceeds of royalty interests.

15-23-608. Lien of tax and penalty -- enforcement of payment. (1) The taxes and/or penalties on such net proceeds must be levied as the levy of other taxes is provided for. Every such tax and/or penalty is a lien upon the mine from which the natural gas, petroleum, or crude or mineral oil is mined or extracted and is a prior lien upon all personal property and improvements used in the process of extracting such natural gas, petroleum, or crude or mineral oil; provided, however, that such personal or real property is owned by or under lease by the person who extracted said natural gas, petroleum, or other crude or mineral oil.

(2) The tax and/or penalty on such net proceeds may be collected and the payment thereof enforced by the seizure and sale of the personal property upon which the tax and/or penalty is a lien in the same manner as other personal property is seized and sold for delinquent taxes or by the sale of the mine and improvements as provided for the sale of real property for delinquent taxes or by the institution of a civil action for its collection in any court of competent jurisdiction; provided, however, that a resort to any one of the methods of enforcing collection, as herein provided for, shall not bar the right to resort to either or both of the other methods but that any two or all of the methods herein provided for may be

used until the full amount of such tax and/or penalty is collected.

15-23-609 through 15-23-616 omitted.

OIL AND GAS SEVERANCE TAX,

MONTANA CODE ANNOTATED,

CHAPTER 36, PART 1

15-36-101. Definitions and rate of tax. (1) Every person engaging in or carrying on the business of producing petroleum, other mineral or crude oil, or natural gas within this state or engaging in or carrying on the business of owning, controlling, managing, leasing, or operating within this state any well or wells from which any merchantable or marketable petroleum, other mineral or crude oil, or natural gas is extracted or produced sufficient in quantity to justify the marketing of the same must, except as provided in 15-36-121, each year when engaged in or carrying on any such business in this state pay to the department of revenue for the exclusive

use and benefit of the state of Montana a severance tax computed at the following rates:

(a) 5% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit on or after April 1, 1981, and on or before March 31, 1983; 6% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit on or after April 1, 1983, and on or before March 31, 1985; and 5% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit thereafter; but in determining the amount of such tax there shall be excluded from consideration all petroleum or other crude or mineral oil produced and used by such person during such year in

connection with his operations in prospecting for, developing, and producing such petroleum or crude or mineral oil;

(b) 2.65% of the total gross value of natural gas produced from each lease or unit; but in determining the amount of such tax there shall be excluded from consideration all gas produced and used by such person during such year in connection with his operations in prospecting for, developing, and producing such gas or petroleum or crude or mineral oil; and there shall also be excluded from consideration all gas recycled or reinjected into the ground.

(2) Nothing in this part may be construed as requiring laborers or employees hired or employed by any person to drill any oil well or to work in or about any oil well or prospect or explore

for or do any work for the purpose of developing any petroleum or other mineral or crude oil to pay such severance tax, nor may any work done or the drilling of any well or wells for the purpose of prospecting or exploring for petroleum or other mineral or crude oils or for the purpose of developing same be considered to be the engaging in or carrying on of any such business. If, in the doing of any such work, in the drilling of any oil well, or in such prospecting, exploring, or development work, any merchantable or marketable petroleum or other mineral or crude oil in excess of the quantity required by such person for carrying on such operation is produced sufficient in quantity to justify the marketing of the same, such work, drilling, prospecting, exploring, or development work is considered to be the engaging in and

carrying on of such business within this state within the meaning of this section.

(3) Every person required to pay such tax hereunder shall pay the same in full for his own account and for the account of each of the other owner or owners of the gross proceeds in value or in kind of all the marketable petroleum or other mineral or crude oil or natural gas extracted and produced, including owner or owners of working interest, royalty interest, overriding royalty interest, carried working interest, net proceeds interest, production payments, and all other interest or interests owned or carved out of the total gross proceeds in value or in kind of such extracted marketable petroleum or other mineral or crude oil or natural gas, except that any of the aforesaid interest that are owned by the federal, state, county, or

municipal governments shall be exempt from taxation under this chapter. Unless otherwise provided in a contract or lease, the pro rata share of any royalty owner or owners will be deducted from any settlements under said lease or leases or division of proceeds orders or other contracts.

Compiler's Comments

1983 Amendment: In middle of (1)(a) inserted "on or after April 1, 1983, and on or before March 31, 1985; and 5% of the total gross value of all the petroleum and other mineral or crude oil produced by such person from each lease or unit".

1981 Amendment: Increased the severance tax on petroleum from 2.1% of the first $6,000 and 2.65% of the production in excess of $6,000 to 5% of the production between April 1, 1981, and March 31, 1983, and 6% thereafter; and deleted subsection (3), which provided for combining all leases in a unitized area for purposes of applying either the 2.1% rate or the 2.65% rate.

15-36-102 omitted.

15-36-103. Determination of gross value of product. The total gross value of all petroleum and other mineral or crude oil or natural gas produced each year shall be determined by taking the total number of barrels or cubic feet thereof produced each month during such year at the average value at the mouth of the well during the month the same is produced, as determined by the department of revenue; provided, however, that in computing the total number of barrels of petroleum and other mineral or crude oil or cubic feet of gas produced, there shall be deducted therefrom so much thereof as is used by such person in connection with the operation of the well from which said oil or gas is produced or for pumping said petroleum or other mineral or crude oil or gas from the said well to a tank or pipeline.

15-36-104 omitted.

15-36-105. Statement to accompany payment -- records -- collection of tax -- refunds. (1) Each and every person must, within 60 days after the end of each following quarter, make out on forms prescribed by the department of revenue a statement showing the total number of barrels of merchantable or marketable petroleum and other mineral or crude oil or cubic feet of natural gas produced or extracted by such person in the state during each month of such quarter and during the whole quarter, the average value thereof during each month, and the total value thereof for the whole quarter, together with the total amount due to the state as severance taxes for such quarter, and must within such 60 days deliver such statement, and, except

as provided in 15-36-121, pay to the department the amount of the taxes shown by such statement to be due to the state for the quarter for which such statement is made. Such statement must be signed by the individual or the president, vice-president, treasurer, assistant treasurer, or managing agent in this state of the association, corporation, joint-stock company, or syndicate making the statement. Any such person engaged in carrying on such business at more than one place in this state or owning, leasing, controlling, or operating more than one oil or gas well in this state may include all thereof in one statement. The department shall receive and file all such statements and collect and receive from such person making and filing a statement the amount of tax payable by

such person, if any, as the same shall appear from the face of the statement.

(2) It shall be the duty of the department to examine each of such statements and compute the taxes thereon, and the amount so computed by the department shall be the taxes imposed, assessed against, and payable by the taxpayer making the statement for the quarter for which the statement is filed. If the tax found to be due shall be greater than the amount paid, the excess shall be paid by the taxpayer to the department within 10 days after written notice of the amount of the deficiency shall be mailed by the department to such taxpayer. If the tax imposed shall be less than the amount paid, the difference must be applied as a credit against tax liability for subsequent quarters or

refunded if there is no subsequent tax liability.

Compiler's Comments

1981 Amendment: Substituted "signed by the individual or the president" for "signed and verified by the oath of the individual or individuals or by the president" in the second sentence of (1); substituted "statement" for "same" at the end of the second sentence of (1).

15-36-106 through 15-36-122 omitted.

RESOURCE INDEMNITY TRUST TAX,

MONTANA CODE ANNOTATED,

CHAPTER 38, PART 1

15-38-101 and 15-38-102 omitted.

15-38-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Department" means department of revenue.

(2) "Gross value of product" means the market value of any merchantable mineral extracted or produced during the taxable year.

(3) "Mineral" means any precious stones or gems, gold, silver, copper, coal, lead, petroleum, natural gas, oil, uranium, or other nonrenewable merchantable products extracted from the surface or subsurface of the state of Montana.

(4) "Total environment" means air, water, soil, flora, and fauna and the social, economic, and cultural conditions that influence communities and individual citizens.

15-38-104. Tax on mineral production. The annual tax to be paid by the person engaged in or carrying on the business of mining, extracting, or producing a mineral shall be $25, together with an additional sum or amount computed on the gross value of product which may have been derived from the business work or operation within this state during the calendar year immediately preceding at the rate of 1/2 of 1% of the amount of gross value of product at the time of extraction from the ground, if in excess of $5,000. Unless otherwise provided in a contract

or lease, the pro rata share of any royalty owner or owners may be deducted from any settlements under the lease or leases or division of proceeds orders or other contracts.

15-38-105. Report of gross yield from mines. A person who engages in or carries on the business of mining, extracting, or producing a mineral from any quartz vein or lode, placer claim, dump or tailings, or other place or source shall make out a quarterly statement of gross yield of the mineral from each mine owned or worked by that person during the quarter. This form shall be in the form prescribed by the department and shall be signed by the person or the manager, superintendent, agent, president, or vice-president of the corporation, association, or

partnership, if any, and shall be delivered to the department on or before the 60th day following the end of the calendar quarter. The statement shall show the following:

(1) the name and address of the owner or lessee or operator of the mine;

(2) the description and location of the mine;

(3) the quantity of minerals extracted, produced, and treated or sold from the mine during the period covered by the statement;

(4) the amount and character of the mineral and the total yield of the mineral from the mine in constituents of commercial value; that is to say, the number of ounces of gold or silver, pounds of copper or lead, tons of coal, barrels of petroleum or other crude or mineral oil, cubic feet of natural gas,

or other commercially valuable constituents of the ores or mineral products or deposits yielded to the person engaged in mining measured by standard units of measurement;

(5) the gross yield or value in dollars and cents.

Compiler's Comments

1983 Amendment: In first sentence, substituted "quarterly" for "on or before March 31 of each year", and substituted "quarter" for "year preceding January 1 of the year in which the statement is made and the value thereof"; and at end of second sentence, substituted "the 60th day following the end of the calendar quarter" for "March 31". 1981 Amendment: Substituted "signed by the person" for "verified by the oath of the person" in the second sentence.

15-38-106. Payment of tax -- records -- collection of taxes -- refunds. (1) The tax imposed by this chapter shall be paid by each person to which the tax applies, on or before March 1, on the value of product in the year

preceding January 1 of the year in which the tax is paid. The tax shall be paid to the department at the time the statement of yield for the last calendar quarter is filed with the department.

(2) The department shall deposit the proceeds of the tax in the resource indemnity trust fund of the nonexpendable trust fund type. Every person to whom the tax applies shall keep records in accordance with 15-38-105, and the records are subject to inspection by the department upon reasonable notice during normal business hours.

(3) The department shall examine each of the four quarterly statements and compute the taxes thereon, and the amount computed by the department shall be the taxes imposed, assessed against, and payable by the taxpayer. If the tax found to be due is greater than the

amount paid, the excess shall be paid by the taxpayer to the department within 30 days after written notice of the amount of deficiency is mailed by the department to the taxpayer. If the tax imposed is less than the amount paid, the difference must be applied as a tax credit against tax liability for subsequent years or refunded if requested by the taxpayer.

Compiler's Comments

1983 Amendments: Chapter 226 made the following changes: in (1), changed payment deadline from March 31 to March 1; near end of last sentence in (1), after "yield" inserted "for the last calendar quarter"; near beginning of first sentence in (3), inserted "four quarterly" before "statements"; at end of first sentence in (3), deleted "making the statement for the year for which the statement is filed"; and made minor phraseology changes.

Chapter 281, in first sentence of (2), substituted "trust fund of the nonexpendable trust fund type" for "trust account of the trust and legacy fund".

15-38-107 omitted.

15-38-108 [prior to 1981 amendment] Lien for collection. The tax assessed against any person under this chapter, together with penalties and interest thereon, shall be a lien upon any and all property owned by such person within this state, which lien shall attach on the date the department files in the office of the county clerk in the county where such property is situated a certified copy of its letter sent under 15-38-107(2). This lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded and may be enforced in the name of the state of Montana in the same manner as judgment liens are enforced by law.

15-38-108 [after 1981 amendment] Warrant for distraint. If all or part of the tax imposed by this chapter is not

paid when due, the department may issue a warrant for distraint as provided in Title 15, chapter 1, part 7. The resulting lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded.

Compiler's Comments

1981 Amendment: Substituted the first sentence for a procedure whereby the department filed a lien on all real property of the taxpayer; and deleted provision at the end of the section providing that the lien may be enforced in the same manner as judgment liens are enforced.

15-38-109 through 15-38-112 omitted.

OIL AND GAS CONSERVATION TAX,

MONTANA CODE ANNOTATED,

TITLE 82, CHAPTER 11

82-11-101. [in pertinent part] Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Board" means the board of oil and gas conservation provided for in 2-15-3303.

(2) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

....

(8) "Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil or gas he produces therefrom either for himself or others or for himself and

others, and the term includes all persons holding such authority by or through him.

....

(11) "Producer" means the owner of a well or wells capable of producing oil or gas or both.

82-11-102 through 82-11-130 omitted.

82-11-131. Privilege and license tax. (1) For the purpose of providing funds for defraying the expenses of the operation and enforcement of this chapter and expenses of the board, an operator or producer of oil and gas shall pay an assessment not to exceed 2/10 of 1% of the market value of each barrel of crude petroleum originally produced, saved and marketed, or stored within the state or exported from the state and the same rate on the market value of each 10,000 cubic

feet of natural gas produced, saved and marketed, or stored within the state or exported therefrom.

(2) The board shall, by rule adopted pursuant to the provisions of the Montana Administrative Procedure Act, fix the amount of the assessment and may from time to time reduce or increase the amount thereof as the expenses chargeable against the oil and gas conservation fund may require. However, the assessment fixed by the board may not exceed the limits prescribed in this section. The amount of the assessment shall be a percentage factor (not to exceed 100%) of the rate set forth in subsection (1) above, and the same percentage factor shall be applied by the board in fixing the amount of the assessment on each barrel of crude production and each 10,000 cubic feet of natural gas

mentioned in that subsection. A producer of the crude petroleum and natural gas shall pay the assessment on each barrel of crude petroleum and each 10,000 cubic feet of natural gas produced for himself, as well as for another, including a royalty holder, and the producer shall be reimbursed for the payments made on crude oil and natural gas produced for another in the same manner as he is reimbursed for net proceeds tax paid on crude petroleum or natural gas produced for another under 15-23-607.

(3) The department of revenue shall collect the privilege and license tax assessment in the same manner as the oil and gas severance tax is collected under Title 15, chapter 36.

Compiler's Comments

1983 Amendment: Near beginning of (2), after "shall" substituted phrase relating to the Administrative Procedure Act for "by order, without prior notice or hearing"; after "may from time to time" deleted "without prior notice or hearing"; after "increase the amount thereof as" deleted "in its judgment"; and inserted (3).

82-11-132. Statements to treasurer and payment of tax. (1) Each producer of crude petroleum in the state shall, not later than the last day of each of the calendar months of February, May, August, and November of each calendar year, render a true statement to the state treasurer, the department of revenue, and the board, duly signed and sworn to, of all crude petroleum produced and marketed by him in this state during the preceding quarter and containing such other information as the board may require and shall accompany the statement with the payment to the state treasurer of the assessment provided for in 82-11-131(1) for the period covered by the statement.

(2) Each producer of natural gas in the state shall render like statements to the state treasurer, the department of revenue, and the board of all natural gas produced and marketed by him in this state and shall make payment of the assessment provided for in 82-11-131(1) at such times and for such periods as may be prescribed by rule of the board.

(3) Any producer carrying on business at more than one place or location in this state may include all those places of business in one statement.

(4) The assessment imposed herein shall be due at the time the oil or natural gas is marketed. Oil or natural gas shall be deemed marketed when it is removed from the property from which it was produced.

Compiler's Comments

1983 Amendment: In (1) after "statement to the state treasurer", substituted "the department of revenue, and the board" for "and a duplicate thereof to the board"; and in (2), after "statements to the state treasurer" inserted "the department of revenue, and the board".

82-11-133 through 82-11-140 omitted.

APPENDIX G

OIL OR GAS PRODUCERS' SEVERANCE TAX,

REVISED CODES OF MONTANA, 1947

TITLE 84, CHAPTER 22

84-2202. (2398) Oil or gas producers' severance tax--amount--exceptions. (1) Every person engaging in or carrying on the business of producing petroleum, other mineral or crude oil, or natural gas within this state or engaging in or carrying on the business of owning, controlling, managing, leasing, or operating within this state any well or wells from which any merchantable or marketable petroleum, other mineral or crude oil, or natural gas is extracted or produced sufficient in quantity to justify the marketing of the same must, except as provided in 84-2213, each year when engaged in or carrying on any such

business in this state, pay to the department of revenue, for the exclusive use and benefit of the state of Montana, a severance tax computed at the following rates:

(a) Two and one-tenth per cent (2.1%) of the total gross value of that portion of all the petroleum and other mineral or crude oil produced by such person from each lease or unit in the calendar quarter not in excess of an amount obtained by multiplying the number of producing wells on such lease or unit by four hundred fifty (450) barrels.

(b) Two and sixty-five hundredths per cent (2.65%) of the total gross value of that portion of all the production of such person from each lease or unit in each calendar quarter in excess of four hundred fifty (450) barrels multiplied by the number of producing wells on such

lease or unit; but in determining the amount of such tax there shall be excluded from consideration all petroleum, or other crude or mineral oil produced and used by such person during such year in connection with his operations in prospecting for, developing and producing such petroleum, crude or mineral oil; provided, however, that nothing in this act shall be construed as requiring laborers or employees, hired or employed by any person, to drill any oil well, or to work in or about any oil well, or prospect or explore for, or do any work for the purpose of developing any petroleum or other mineral or crude oil to pay such severance tax, nor shall any work be done, or the drilling of any well or wells, for the purpose of prospecting or exploring for petroleum or other mineral or crude oils, or for the

purpose of developing same, be deemed to be engaging in or carrying on of any such business; provided, further, that in the doing of any such work, or in the drilling of any oil well, or in such prospecting, exploring or development work, any merchantable or marketable petroleum or other mineral or crude oil in excess of the quantity required by such person for carrying on such operation shall be produced sufficient in quantity to justify the marketing of the same, then such work, drilling, prospecting, exploring or development work is considered to be the engaging in and carrying on of such business within this state within the meaning of this section.

(c) 2.65% of the total gross value of natural gas produced from each lease or unit, but in determining the amount of

such tax there shall be excluded from consideration all gas produced and used by such person during such year in connection with his operations in prospecting for, developing, and producing such gas or petroleum or crude or mineral oil; and there shall also be excluded from consideration all gas recycled or reinjected into the ground.

(2) For purposes of computing the tax in subsections (1)(a) and (1)(b) above, lease count includes all leases contributing to the unitized area within a unit or all tracts within a unit participating in production.

(3) Every person required to pay such tax hereunder shall pay the same in full for his own account and for the account of each of the other owner or owners of the gross proceeds in value or in kind of all the marketable petroleum

or other mineral or crude oil or natural gas extracted and produced, including owner or owners of working interest, royalty interest, overriding royalty interest, carried working interest, net proceeds interest, production payments, and all other interest or interests owned or carved out of the total gross proceeds in value or in kind of such extracted marketable petroleum or other mineral or crude oil or natural gas, except that any of the aforesaid interests that are owned by the federal, state, county, or municipal governments shall be exempt from taxation under this chapter. Unless otherwise provided in a contract or lease, the pro rata share of any royalty owner or owners will be deducted from any settlements under said lease or leases or division of proceeds orders or other contracts.

84-2203 omitted.

84-2204. (2400) Determination of gross value of product. The total gross value of all petroleum, and other mineral or crude oil or natural gas produced each year shall be determined by taking the total number of barrels or cubic feet thereof produced each month during such year at the average value at the mouth of the well during the month the same is produced, as determined by the state department of revenue; provided, however, that in computing the total number of barrels of petroleum, and other mineral or crude oil or cubic feet of gas produced, there shall be deducted therefrom so much thereof as is used by such person in connection with the operation of the well from which said oil or gas is produced or for pumping said

petroleum or other mineral or crude oil or gas from the said well to a tank or pipeline.

84-2205. (2401) Producers to file reports. Each and every person engaged in such business in the state of Montana at the date when this act becomes effective, must, not later than the thirtieth day of April, 1923, and every person who shall engage in such business at any time after the date when this act becomes effective, must, immediately upon engaging in such business, file with the state department of revenue, a certificate and statement, on forms prescribed by the state department of revenue, which shall contain the name under which such person is engaging in and carrying on such business in this state, giving the place or places of

business and location of the well or wells owned, leased, controlled or operated by such person; the name and address of the managing agent in this state, if an association, corporation, joint-stock company, or syndicate, or if a firm or copartnership, the names and addresses of the persons composing the same; if an association, joint-stock company, corporation or syndicate, under the laws of what state organized, its principal place of business, and the names and addresses of its principal officers; and such other information as the department may deem necessary.

84-2206 through 84-2209 omitted.

84-2209.1 Procedure for collection of tax. All tax, penalty, and interest due from any person under this act shall

be a lien upon any and all real property of such person when the department of revenue files in the office of the county clerk in the county where such real property is situated a certified copy of its statement of estimated tax computed under 84-2209. This lien shall have precedence over any other claim, lien, or demand thereafter filed and recorded and may be enforced in the name of the state of Montana in the same manner as judgment liens are enforced by law.

84-2212 and 84-2213 omitted.

APPENDIX H

58 Interior Dec. 535 (1943),

"Liability of Indian Tribes for State Taxes Imposed on Royalty Received From Oil and Gas Leases"

HARPER, Solicitor:

You [Secretary of the Interior] have presented for my opinion the question of the liability of the Ute Mountain and Blackfeet Tribes of Indians for certain taxes imposed by the States of New Mexico and Montana, respectively, on the tribes' royalty interests in oil and gas mining leases. Both of these tribes receive royalty from leases executed pursuant to section 3 of the act of February 28, 1891

(26 Stat. 795), as amended by the act of May 29, 1924 (43 Stat. 244, 25 U.S.C. sec. 398), authorizing the leasing of unallotted Indian lands for mining purposes. The amendatory act of May 29, 1924, supra, provides that--

> * * * the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The question for consideration is whether the permission granted by Congress for the taxation of the production of oil and gas extends to the particular taxes which the States of New Mexico and Montana are attempting to

collect from the royalty interests of the Indians.

The State of New Mexico levies what is known as a severance tax on certain natural resource products, including oil and gas, severed from the soil of the State. Such tax is payable by the owner or proportionately by the owners thereof at the time of the severance.[1] The rate of the tax on oil is two percent of the value thereof.[2] The tax is required to be paid by those actually engaged in the operation of severing. The reporting taxpayer is authorized to collect and withhold out of the value of said products so severed the proportionate parts of the total tax due from the

1 Laws of New Mexico, 1937, ch. 103, sec. 1; sec. 76-1031, New Mexico Stat., 1941, Ann.

2 Sec. 2; 76-1302.

respective owners of the severed products at the time of the severance.[3]

The act provides:

> Every person actually engaged in the severing of any of said products mentioned herein from the soil or actually operating the properties from which said products are severed under contracts or agreements requiring royalty interest, excess royalty, or working interest, either in money or in kind, is hereby authorized, empowered, and required to deduct from any amount due or from anything due, the amount of tax herein levied before making such payments; Provided, however, no such deductions shall be made from any amount or amounts due the United States of America or the State of New Mexico as royalty or rental payments.[4]

The act further provides:

3 Sec. 6; 76-1306.

4 Sec. 7; 76-1307.

> The payment of the severance tax levied by this act shall be in addition to and shall not affect the liability of the party or parties so taxed for the payment of all state, county, municipal, district and special taxes levied upon their real estate and other corporeal property, including the emergency school tax, production, and other special taxes. No severance tax shall be levied by any county or other political subdivision of the state.[5]

Both the States of New Mexico and Montana have in recent years set up administrative agencies for the regulation of oil and gas wells and both States levy a tax on oil produced in addition to all other taxes for the purpose of meeting the expense of such boards. Both States are attempting to collect these taxes from the royalty interests of the Indians.

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5 Sec. 15; 76-1315.

The State of New Mexico levies a tax of one-eighth of one per cent on the proceeds of all oil and gas produced in the State except royalties payable to the United States[6] or to the State[7]. For the purposes of this opinion I shall designate this tax as "the oil conservation fund tax." The tax is collected in the same manner as the severance tax is collected.

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6 The State cannot be presumed to have intended to include the Indians' royalty interests in the exemptions granted on royalty paid to the United States in this and in the severance tax act. See in this connection Laws of New Mexico, 1925, ch. 83, sec. 2, p. 126; sec. 76-1002, New Mexico Statutes, 1941, Annotated, where the State legislature, in providing for an operators' net proceeds tax, permits the deduction of royalties paid "to the United States, or to any Indian tribe or Indian, being wards of the United States, or the State of New Mexico."

7 Laws of New Mexico, 1935, ch. 72, sec. 25; sec. 69-231, New Mexico Statutes, 1941, Annotated.

The State of Montana levies what it terms a "privilege and license tax" of one-fourth of one cent on every barrel of petroleum produced in the State. The producers are required to pay the tax on petroleum produced for themselves as well as for royalty holders and are to be reimbursed by the royalty holders for the tax paid on their interests in the same manner as the producers are reimbursed for the net proceeds tax paid on crude petroleum produced for others.[8]

In my opinion, all of these taxes are within the permissive act of Congress and must be paid out of the royalty interests of the Indians.

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8 Laws of Montana, 1937, ch. 123, sec. 1; Revised Codes of Montana, 1935, vol. 2, 1939 pocket part, sec. 3554.14.

The act of May 29, 1924, _supra_, was considered by the Supreme Court of Montana in the case of _British-American Oil Producing Company v. Board of Equalization, et al._, 54 P.(2d) 129. There the oil company, the owner of a producing oil and gas lease on lands within the Blackfeet Indian Reservation, sought to enjoin the State Board of Equalization from collecting the Montana "corporation license tax," the "operators' net proceeds tax," an oil producers' license tax termed by the court a "gross production tax," and the "royalty owners' net proceeds tax" all arising out of the production and recovery of oil from the leased lands. The Blackfeet Tribe intervened, alleging that by reason of certain treaties and acts of Congress the lands embraced

within its reservation were tax exempt and that the oil produced from the tax-exempt lands and the royalty derived from the production of oil were likewise exempt from taxation.

The Montana Supreme Court and the United States Supreme Court on appeal[9] ruled that all of these taxes fell within the permission given by the act of 1924.[10] The taxes under consideration

9 299 U.S. 159.

10 Both courts assumed, under the then prevailing rule laid down in Choctaw, O. & Gulf R.R. Co. v. Harrison, 235 U. S. 292; Indian Territory Co. v. Oklahoma, 240 U. S. 522; and Jaybird Mining Co. v. Weir, 271 U. S. 609, that even a lessee's interest in oil produced from restricted Indian lands could not be taxed without the consent of Congress. While that rule has now been renounced (Helvering v. Mountain Producers Corporation, 303 U. S. 376), so that the State is free to tax a lessee's interest without congressional consent, the renunciation of this rule does not detract in any way from the validity of

must likewise be held to be within that permission. The language of the statute is that the "production of oil and gas and other minerals * * * may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands." All that is essential to the validity of the tax under this broad language is that the tax be one on mineral production and that it be exacted from production on unrestricted lands. The taxes under consideration meet both of these requirements.

My attention has been called to the fact that the Office of Indian Affairs at

(Footnote 10, continued) the interpretation given by the courts in this case to the 1924 act so far as it affects the taxation of the Indians' royalty interests.

one time authorized the payment of the Blackfeet Tribe's proportionate share of the Montana "privilege and license tax" but that the Department has recently refused to authorize the payment of this tax as well as "the oil conservation fund tax" levied by the State of New Mexico. Such refusal was based on the premise that the act of May 29, 1924, supra, authorized the levy of a gross production tax only and that any other tax levied by the States was unauthorized. Oklahoma ex rel. Oklahoma Tax Commission, et al. v. Barnsdall Refineries, Inc., et al., 296 U.S. 521, was relied on to support this position. There the Supreme Court had under consideration a much more limited assent by Congress to the taxation of the Indians' royalty interest. Congress had authorized the State of Oklahoma to levy a gross production tax on all oil

produced in Osage County, Oklahoma, and the Secretary of the Interior was authorized to pay such gross production tax in lieu of all other State and county taxes levied on the production of oil and gas as provided by the State law. The Secretary was also authorized to pay an additional sum of one percent of the amount received by the Osage Tribe of Indians as royalties from the production of oil and gas, such sum to be used by Osage County for the construction and maintenance of roads and bridges in the county.[11]

The State of Oklahoma thereafter enacted a law providing for a tax of one eighth of a cent per barrel on oil produced in the State. The question

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11 Section 5 of the Act of March 3, 1921 (41 Stat. 1249, 1250).

before the court was whether that tax, when applied to oil produced by lessees on lands of the Osage Tribe of Indians, was within the congressional consent. The court held:

> Congress, in removing the tax immunity, thus had in contemplation the particular tax then on the statute books of Oklahoma, then and ever since described as a gross production tax, the benefits of which would inure to Indians in Osage County by the distribution of a part of the tax to that county. The section bears its own evidence of the intention that the waiver of tax immunity of the production of oil from Indian lands was to be limited to a tax having these characteristics. The tax is described as a gross production tax. It is to be "paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, * * *." The reference must be taken to be to the laws then in effect, unless we are to indulge the improbable assumption that the state was to be left free to dispense with the requirement

> that the tax permitted was to be in lieu of all other taxes.
>
> * * * * * * *
>
> The Supreme Court of Oklahoma emphasized the fact that the 1/8 of a cent per barrel tax, denominated by the statute an "excise," is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied, and different from the gross production tax in its temporary character and the method of its computation and distribution, and so concluded that it is not a tax contemplated by the congressional consent. Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right.

That decision cannot be relied upon as authority for refusing to pay taxes levied by other States under the authorization contained in the act of May 29, 1924. There the tax authorized to be collected was named--a gross production tax--and was to be in lieu of

all other taxes. In the 1924 act neither of these limitations appears.

At the time the act of May 29, 1924, was under consideration by the House of Representatives the question was raised as to the situation with respect to taxation. The statement was made that since Congress had recently passed two acts requiring the Quapaw Indians[12] and the Osage Indians[13] to pay the gross production tax to the State it was thought only fair, inasmuch as that same kind of taxation was going to be extended, perhaps, into various States, that the gross production tax should go to the upbuilding of the State. The statement was also made that the bill

12 Section 26 of the act of March 3, 1921 (41 Stat. 1225, 1249).

13 Section 5 of the act of March 3, 1921 (41 Stat. 1249, 1250).

under consideration gave the State the same kind of tax as was given under the Osage act.[14] It is significant to note, however, that the wording of the two sections is materially different. The wording of the Quapaw act referred to in the debate is identical with the 1924 act. It must be assumed that had Congress intended to limit the right of the States to a tax on the gross production, in lieu of all other taxes, as was done in the Osage act, Congress would have chosen the words of that act rather than the broader words of the Quapaw act.

My conclusion is that the States of New Mexico and Montana, in seeking to impose the taxes under consideration, plainly come within the permission given

14 65 Cong. Rec. 6855 (1921).

by the act of May 29, 1924. This conclusion makes it unnecessary, of course, to decide whether such taxes could be validly assessed and collected by the States in the absence of congressional consent (compare Oklahoma Tax Commission v. United States, 319 U. S. 598).

Approved:

Oscar L. Chapman,

Assistant Secretary.

Opinion of the Department of Interior

M-36246, October 29, 1954,

"State Taxation of Tribal Royalty Interests in Oil and Gas Leases on Blackfeet Indian Reservation"

MEMORANDUM

TO: Commissioner of Indian Affairs

FROM: Solicitor

SUBJECT: Collection of Montana State tax on oil and gas royalty interests in the Blackfeet Tribe

There have been referred to this office for its consideration letters from your Billings Area Office, respecting the procedures for the collection of a net proceeds tax levied by the State of Montana against the oil and gas royalties due the Blackfeet Tribe from unallotted oil and gas produced by lessees on the Blackfeet Reservation. The authority of the State to levy such a tax has heretofore been considered and confirmed. British American Oil Producing Company v. Board of Equalization, 299 U.S. 159

(1936); Op. Sol. M-32093, September 20, 1943. The immediate question, therefore, relates not to the taxability of the tribal royalty interest but rather to the procedure by which the tax may be paid.

The applicable Montana statute relating to the procedure for the payment of these taxes states in part:

> "* * * The operator or producer shall be liable for the payment of said taxes, and same shall be payable by and shall be collected from such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such payment operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest." Sec. 84-5409, Revised Codes of Montana, 1947, Annotated.

The Act of May 29, 1924 (25 U.S.C. 398), by which the Congress consented to

the taxability of such royalty interests, states in part that:

> "* * * the production of oil and gas and other minerals on such [unallotted] lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands * * *."

From the letters received from the Area Office, it appears that the problem of devising an administratively convenient procedure for the payment of the Montana tax is complicated by a past ruling of this Department that the 1924 Act requires the Secretary to pay the tax and does not permit oil and gas lessees, as contemplated by the quoted Montana statute, to pay the tax to the State and deduct the amount thereof from the

royalty payments made to the tribe. This ruling is contained in a letter dated March 20, 1945, addressed to the Superintendent of the Navajo Agency and signed by Mr. Walter V. Woehlke, for the Commissioner, and approved by then Assistant Secretary Chapman on April 3, 1945, which dealt with a New Mexico statute similar to the Montana statute and its application to the payment of taxes on the royalty interests of the Navajo tribe in its tribal oil and gas leases. In the course of that letter it was stated:

> "It is believed that your office should submit to the New Mexico Bureau of Revenue a statement based on information available from the records of the Geological Survey supervisory office, showing the amount of royalties received to the credit of the Navajo tribe during the current year, and that you should suggest to the Revenue Bureau that it submit

> to you a separate tax bill for each tax the State is levying against the Indian royalty interest, citing on each bill the State statutory provision pursuant to which the tax is being levied. Upon receipt of the tax bills they should be carefully examined by your office and by the Supervisor's office, and if found to be correctly computed and to cover the taxes referred to in the Solicitor's opinion, the bills may then be paid by your office. It might be advisable for you to point out to the New Mexico Bureau of Revenue that while such a procedure is apparently not the normal procedure for collection of the taxes on production from non-Indian lands, where the operators make deductions for taxes on landowner's royalty share, some variation is necessary with respect to restricted tribal lands inasmuch as the act of May 29, 1924 (43 Stat. 244, 25 U.S.C. sec. 398), and the Comptroller General's rulings of September 21, 1932, and November 9, 1932, A-44569, make it the function and duty of the Secretary of the Interior to pay such taxes as come within the authorization contained in the said act of May 29, 1924."

It appears from the records that for the past several years the procedure outlined in the letter of March 20, 1945 has not been pursued in the case of the Blackfeet Reservation because, pursuant to the provisions of the tribe's oil and gas leases, oil and gas royalties have been paid by lessees directly to the tribe and not to the Superintendent. Moreover, it is represented that the tribe has not promptly paid the taxes due with the consequence that various lessees are being billed by the State and are becoming apprehensive of their legal rights in the situation. In the circumstances, reexamination of the basis for the conclusion reached in 1945 that the Secretary of the Interior must pay such taxes seems warranted.

The rulings of the Comptroller General, upon which the 1945 conclusion is based, related to the procedures for the collection of an Oklahoma State tax of 3 per cent on the gross production of oil and gas from restricted Indian lands of the Five Civilized Tribes. The Comptroller General held that it was the obligation of the Indian Service to collect the royalties in full and to remit the taxes to the State rather than to direct the lessee to remit the taxes and deduct them from the royalties. The Comptroller General's rulings were specifically posited upon Section 3 of the Act of May 10, 1928. 45 Stat. 496, which provides in part:

> "* * * The Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and

> belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interests of the respective Indian owners of such oil, gas and other mineral production."

It is readily observed that the 1928 Act explicitly required the taxes to be paid out of specified funds in the custody of the Secretary. The Comptroller General's rulings in the case of the Five Civilized Tribes, therefore, would not seem to be controlling in the case of the 1924 Act, which merely authorizes and directs the Secretary to cause the tax to be paid without indicating in any way whatsoever the manner in which it is to be paid or the source of the funds to be used therefor. Indeed, under the 1924 statute, the Secretary would seem to have fulfilled the obligation imposed upon him by the Congress when, through suitable

arrangements, he causes the tax to be paid either by the tribe or by the lessees.

The Billings Area Office has suggested that, subject to various administrative controls, the lessees be asked to pay the tax directly to the State, to deduct the amount thus paid when remitting their royalty payments to the tribe, and to support the deduction with properly receipted tax bills. Such an arrangement, it seems to me, is permissible under the 1924 Act and would not impair the obligations under the lease contract between the lessees and the tribes. Forbes v. Mid-Northern Oil Company, 45 Pac. (2d) 673, 679.

J. REUEL ARMSTRONG,
Acting Solicitor.

Opinion of the Department of Interior,
M-36310, October 13, 1955
"Right of the State to Impose a Privilege and License Tax Against the Royalty Interest of the Indian Tribes of the Fort Peck Reservation, Montana"

Memorandum

TO: Commissioner of Indian Affairs

FROM: Associate Solicitor, Indian Affairs

SUBJECT: Oil and gas privilege and license tax, Fort Peck Reservation, under laws of Montana

You have referred to this Office for consideration a letter dated March 31, 1955, from your Area Director at Billings, Montana, accompanied by a Resolution by the Tribal Executive Board of the Indians of the Fort Peck Reservation opposing the payment of a privilege and license tax imposed by the State of Montana on the royalty interest of the Tribe in crude oil produced on the reservation.

Section 60.145, Volume 4, of the Revised Code of Montana (1947), providing for the assessment of the privilege and license tax, after stating the schedule of assessments, reads in part as follows:

> "Producers thereof shall make such payment on each and every barrel of crude petroleum and each ten thousand (10,000)

> cubic feet of natural gas produced for themselves as well as for others including royalty holders and shall be reimbursed for such payments made on crude oil and natural gas produced for others in the same manner as they are reimbursed for net proceeds tax paid on crude petroleum or natural gas produced for others as provided for in section 84-5409."

Section 84.5409 of the Code provides that operators or producers of oil shall be liable for the tax:

> "* * * provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interests, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interests."

An Act of Congress approved May 29, 1924 (43 Stat. 244; 25 U.S.C. 398), authorizes the Secretary of the Interior to approve oil and gas mining leases on unallotted land of Indians, other than

the Five Civilized Tribes and the Osage Reservation, and provides:

> "* * * the production of oil and gas and other minerals on such [unallotted] lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands* * *"

The provisions of the Act of May 29, 1924 are broad and all inclusive, authorizing the State to tax the production of oil and other minerals "in all respects the same as production on unrestricted lands." In an Opinion by the Solicitor of this Department rendered September 20, 1943 (58 ID 535-538), it was held that the Act embraces the Montana privilege and license tax. See also British American Oil Production

Company v. Board of Equalization, 299 U.S. 159 (1936). You are accordingly advised that the tax is assessable against the tribal royalty from oil and gas mining leases on the Fort Peck Indian Reservation.

(Sgd) W. H. FLANERY

Associate Solicitor, Indian Affairs

Opinion of the Department of Interior,
M-36345, May 4, 1956,
"State Production Taxes on Tribal
Royalties from Leases Other Than
Oil and Gas"

MEMORANDUM

TO: Regional Solicitor, Denver

FROM: Associate Solicitor, Indian Affairs

SUBJECT: Payment of severance and conservation taxes from tribal royalties under leases of tribal lands in the State of New Mexico for the mining of uranium and minerals associated therewith

You have requested an opinion on whether the act of May 29, 1924 (43 Stat. 244; 25 U.S.C. 398) subjecting royalties from leases on unallotted tribal land to State production taxes, is applicable to production of minerals other than oil and gas.

The act of February 28, 1891 (26 Stat. 795; 25 U.S.C. 397) authorized the leasing of unallotted tribal land for mining purposes for a term of 10 years. The amendatory act of May 29, 1924 authorized oil and gas leases on such lands for a period of 10 years for so long thereafter as oil and gas is being produced in paying quantities, "Provided that * * * the production of oil and gas and other minerals on such lands may be taxed by the State in which such lands are located in all respects the same as production on unrestricted land * * *." (Italics supplied). Thus by specific language the act covers minerals other than oil and gas. The mere fact that the act of May 29, 1924, permitted a longer period of leasing for oil and gas purposes could not be the basis of an

implication that the taxation of production applied only to oil and gas leases. Nor has the general mineral leasing act of May 11, 1938 (25 U.S.C. 396a-f) affected the taxing power of the State under the 1924 act or under section 3 of the act of March 3, 1927 (44 Stat. 1347, 25 U.S.C. 398c) pertaining to the taxation of production from mineral leases on Executive Order Indian reservations. Only those matters which were inconsistent therewith were repealed by section 7 of the 1938 act. The primary purpose of this act, which is silent as to such taxes, was to obtain uniformity so far as practicable in the law relating to the leasing of unallotted tribal land for mining purposes on Indian reservations.

The States' taxation of production

under the two acts is contained in independent provisions, and not in provisos which would have been superseded along with their leasing provisions by the 1938 act. Although the taxing provisions of the 1924 act are preceded by the word "provided" that does not always mean that the proviso is inseparably connected with the general language to which it is attached. Among other things, provisos are often used to introduce a new subject matter. Quite clearly the proviso was so used in the 1924 act and consequently the taxing provisions of this act as well as the taxing provisions separately contained in section 3 of the 1927 act are in full force and effect.

(Sgd) W. H. FLANERY

Associate Solicitor, Indian Affairs

84 Interior Dec. 906 (1977)

"The Tax Status of the Production of Oil and Gas from Fort Peck Tribal Lands."

You have requested our opinion on whether or not the State of Montana has authority to apply its production tax to oil and gas produced from mineral leasing of tribal lands of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. Production taxes have been levied by the State under the purported authority of the Act of May 29, 1924, 43 Stat. 244 (25 U.S.C. § 398 (1970)), and are being paid by the lessees prior to paying royalties to the Tribes. See Revised Codes of Montana, §§ 84-7006, 84-5401, 84-6205, 84-2202, 60-145. In

1966, the tax was determined applicable to oil and gas production from Fort Peck tribal lands by the Assistant Secretary and the Deputy Assistant Secretary, relying on legal advice from this office. See Attachments No. 1 and 2 hereto. After careful reconsideration, we have concluded that that earier determination is erroneous as a matter of law. Specifically, we hold that production of oil and gas on Fort Peck tribal lands--or lands of other tribes--from leases made under the Indian Mineral Leasing Act, May 11, 1938 (52 Stat. 347; 25 U.S.C. §§ 396a-396f (1970)) are not taxable by the state.[1]

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1 At the present time there are 82 active leases at Fort Peck, eight of which are producing oil, all of which were authorized under the 1938 Act. Prior to a lease being given, a sale is conducted under departmental regulations.

The Assistant Secretary's 1966 determination relied heavily on the Supreme Court's decision in British-American Oil Co. v. Board of Equalization, 299 U.S. 159 (1936). In British-American, a non-Indian mineral lessee on the Blackfeet Reservation sued to enjoin collection of state gross production and net proceeds taxes on its oil and gas revenues.[2] The Court held taxation of the non-Indian lessee was authorized by a 1924 statute (43 Stat.

(Footnote 1, continued) A notice of advertisement of the sale is made which cites the 1938 Act and the regulations published thereunder (25 CFR Part 171) as the authority for the leasing of tribal lands. Leases are then awarded to the bidder who offers the highest "money bonus on a tract basis."

2 The Tribe's interest was not argued before the Supreme Court.

244), 25 U.S.C. § 398 (1970).[3] This 1924 statute permits state taxation of the production of oil and gas and other minerals from lands leased under the

3 This statute provides:
"Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under sec. 397 of this title may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is

earlier 1891 Indian mineral leasing statute, 25 U.S.C. § 397 (1970). Sec. 397 reads:

> Where lands are occupied by Indians who have *bought and paid for* the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (Italics added.)

(Footnote 3, continued)
authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

The Court in British-American opined that the Blackfeet lease was authorized by sec. 397; hence, taxation was authorized by the 1924 statute. The Court relied upon "uniform administrative practice" and "judicial decision" construing the "bought and paid for" language in sec. 397 "as not confined to lands acquired by Indians through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights." 299 U.S. at 164.

We conclude that British-American is inapposite to production under the Fort Peck leases for a number of reasons. First, the question of whether sec. 397 authorized the lease was not the subject

of any dispute between the parties. The State agued [sic] that the statute applied; otherwise, the 1924 Act authorizing taxation could not have been relied upon. The lessee agreed that the statute applied; otherwise since there would be no other applicable Indian mineral leasing authority, its underlying lease would have been void. See 25 U.S.C. § 177 (1970). The Court's statements that the statute authorized the lease thus arose in this context. Moreover, the lease in issue in British-American specifically "recites that it was given in accordance with § 3 of the Act of Feb. 28, 1891, * * * as amended by [the] Act of May 29, 1924 * * *." The relationship of the 1938 Act to sec. 398 was not (nor could it have been) an issue. The decision is

not, then, authority for holding tribal royalties taxable, particularly when the lease is made under the 1938 Act, and not under the earlier 1891 statute.

It is understandable that, since it was for many years the only general mineral leasing authority covering tribal lands, the 1891 statute would have been broadly construed by the Court's dicta in 1936 and by the few administrative decisions of the Department preceding British-American.[4] However, in 1938, shortly after the decision, Congress enacted a new general and comprehensive Indian mineral leasing statute. 25 U.S.C. §§ 396a-396f (1970). The 1938 Act contains no explicit provision similar to

4 The two earliest Departmental decisions are expressions by the Assistant Attorneys General dated Jan. 11, 1892, and Nov. 17, 1897. The 1892

that in the 1924 Act authorizing the imposition of state taxes.

The failure to clearly state the relationships among the statutes creates an ambiguity with respect to whether the 1924 taxing authority was meant to be repealed by sec. 7 of the 1938 Act as inconsistent with the later Act. Since the 1938 Act made no provision for

(Footnote 4, continued) letter states that by using the "bought and paid for" language:

"* * * Congress was legislating with reference to those Indians who have, under treaty or otherwise, become possessors or owners of certain specific tracts or bodies of lands, by purchase, or exchange or surrender of other property in contradistinction to those Indians who are occupying reservations created by executive order or legislative enactment."* * * (Italics added.)

Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 P. 348, 351 (1896).

taxation, even though it was intended to be a comprehensive scheme for mineral leasing of tribal land, that Act could reasonably be construed, given the rules for interpretation of statutes passed for the benefit of Indians (discussed infra), as having repealed the earlier taxing proviso. However, I do not believe such a conclusion is necessary here. Even if the 1924 taxing authority was not repealed as to leases entered into pursuant to the 1891 Act, it is far from clear that the 1938 Act intended to carry forward and incorporate the taxing authority into the general leasing scheme provided therein, resulting in a situation where leases entered into pursuant to the later Act would be subject to the earlier taxing authority. In fact, the clear intent of the 1938 Act

was to replace the earlier leasing statutes, not to complement or incorporate them. The 1938 statute, as noted, does not itself authorize state taxation, nor does it refer to the 1924 proviso. The failure of the 1938 Act to either clearly repeal or clearly adopt the earlier Act at most creates an ambiguity which necessarily calls into play the appropriate rules of statutory construction.

The 1897 decision (25 L.D. 408), involved the validity of a lease on the Uintah Reservation. It sets forth in some detail the history of that reservation, emphasizing the process by which tribes ceded other lands and agreed to move onto the reservation. Id. at 410-11. The opinion concludes that where tribal lands elsewhere are surrendered

in return for the creation of a reservation, the reservation lands are "bought and paid for" within the meaning of the 1891 Act.

The general rules for the construction of Indian statutes, particularly those in which a tax question is present, were recently summarized by the Supreme Court in Bryan v. Itasca County, Minnesota, 426 U.S. 373-392 (1976):

> * * * [I]n construing this "admittedly ambiguous" statute, Board of Com'rs v. Seber, 318 U.S. at 713, we must be guided by that "eminently sound and vital canon," Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). See Choate v. Trapp, 224 U.S.

> 665, 675 (1912); Antoine v. Washington, 420 U.S. 194, 199-200 (1975). This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. McClanahan v. Arizona State Tax Comm'n, 411 U.S., at 174; Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Carpenter v. Shaw, 280 U.S. 363, 366-367 (1930). "This is so because * * * Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 613-614 (1943) (Murphy, J., dissenting).

In Bryan, the Supreme Court held that sec. 4(a) of Public Law 280 (codified at 28 U.S.C. § 1360 (1970)), because it is not a clear grant of power to the states to tax, did not terminate

the traditional Indian immunity from state taxation. 426 U.S. at 393.[5]

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5 In Choate v. Trapp, 224 U.S. 665 (1912), the Supreme Court considered whether a statutory exemption of allotted reservation lands from state taxation was repealed by implication by a second statute which removed certain restrictions on alienation imposed by the first statute. The state officials who were parties to the case relied upon the general principle that tax exemptions should be narrowly construed. After conceding the general applicability of that doctrine, the Court held that as to:

> "* * * the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, * * *." 224 U.S. at 675.

Accord, McClanahan v. Arizona State Tax Commission supra.

If the 1938 Act incorporated the 1924 taxing proviso, it must have done so by implication,[6] for there is no express provision. Yet in Bryan, the Supreme Court declined to find a similar implied grant of taxing power in Public Law 280. Observing that Congress had enacted several termination statutes which were "cogent proof that Congress knew well how

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6 An interpretation of the 1938 Act as incorporating the 1924 tax proviso would be especially repugnant in the case of those reservations and those minerals for which leasing authority was first created by the 1938 Act, and for which, therefore, no taxing authority previously existed, since as to these, a tax immunity would be terminated by implication. See, the transmittal letter of the Assistant Secretary of the Interior in H. Rep. 1872, 75th Cong., 1st Sess., 1938, describing the confused situation with respect to existing leasing authority and demonstrating that, in certain instances, no authority existed at all.

to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation," the Court concluded that "if Congress in enacting Public Law 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so." 426 U.S. at 389-390. With respect to the 1938 leasing Act, the situation is exactly the same. Had Congress intended to include state taxing authority, it would have done so expressly. The fact that it had earlier done so, for leases issued under the 1891 Act, is clear evidence that it knew how to grant such authority to the states, had it so intended.

The 1938 Act was proposed by the Department. The Secretary's transmittal letter states that "* * * [o]ne of the purposes of the legislation now proposed, * * * is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes."[7] Prior to the 1938 Act, "the law governing leases on tribal land [was] in a patchwork state."[8] The 1938 legislation was intended as a

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7 Letter of June 17, 1937, from Acting Secretary Charles West to the Speaker of the House of Representatives, H. Rep. No. 1872, 75th Cong., 2d Sess., also quoted in F. S. Cohen, Handbook of Federal Indian Law, p. 328, n. 468 (G.P.O. 1940 Ed.).

8 Cohen, supra, Ftn. 4 at p. 328. The law prior to 1938 was described in the Secretary's transmittal letter proposing the legislation as follows:

"Under sec. 26 of the Act of June 30, 1919 (41 Stat. 31), as amended,

"comprehensive law covering mineral leases on unallotted land. * * *"[9] The

(Footnote 9, continued) leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of sec. 3 of the Act of Feb. 28, 1891 (26 Stat. 785), as amended May 29, 1924 (43 Stat. 244), leases for oil, gas and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Sec. 16 of the Indian Reorganization Act, approved June 18, 1934 (48 Stat. 984), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under sec. 17 of that act Indian tribes to which charters of incorporation issued are empowered to lease their lands for periods of not more than ten years. There is at present no law under which Executive order lands may be leased for mining outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under secs. 16 and 17 of the Indian Reorganization Act. * * *"

9 Ibid.

Act authorized leasing of all "unallotted lands within any Indian reservation * * * by authority of the tribal council or other authorized spokesmen for such Indians." 25 U.S.C. § 396a (1970). The comprehensive procedures in the Act provide for public auctions of oil and gas leases, the rejection of all bids and readvertisement if it is in the interests of the Indians (25 U.S.C. § 396b (1970)), and impose bonding requirements on lessees of tribal land (25 U.S.C. § 396c (1970)). The 1938 Act refers to the Indian Reorganization Act (48 Stat. 987) which permits Indian tribes organized and incorporated under secs. 16 and 17 of the IRA to lease lands for mining purposes in accordance with the provisions of any tribal constitution and charter. See 25

U.S.C. §§ 476, 477 (1970).

It is clear that states cannot tax trust property, reservation Indians, or Indian tribes unless Congress has consented;[10] and it is likewise well-established that statutes diminishing Indian tax exemptions are strictly construed.[11] Accordingly, we attach considerable significance to the fact that Congress did not provide in the

10 Bryan v. Itasca County, supra; Confederated Salish and Kootenai Tribes v. Moe, 48 LEd2d 96 (1976); McClanahan v. Arizona State Tax Commission, supra; Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); British-American Co. v. Board, supra, at p. 16.

11 See Choate v. Trapp, supra, at Ftn. 5.

1938 Act that tribal royalties received under that statute were to be subject to state taxation. We conclude accordingly that royalties received from leases executed under authority of the 1938 statute are not subject to the proviso in 25 U.S.C. § 398 (1970). Only if a lease is entered into under the 1891 statute would the proviso consenting to taxation be applicable. The Bureau should administer its leases accordingly.

This interpretation of the 1891 Act, the 1924 amendment and the 1938 Act is consistent with present Congressional policy on Indians. Both the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit recently have stated that when interpreting Indian statutes you must take into consideration the present Congressional policy on Indians.

Bryan, _supra_, at p. 15, ftn 14; _Santa Rosa Band of Indians v. Kings County_, 532 F.2d 655, 663 (9th Cir. 1975), _cert. denied_, 429 U.S. 1038 (1977). That Congressional policy is one of "fostering Indian autonomy, reservation self-government and economic self-development." _Santa Rosa_, _supra_. Our reading of the 1938 Act is not only consistent with and an implementation of this policy, but is also consistent with Congress' Indian policy when the 1938 Act was enacted into law. _See_ Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-478 (1970). As Felix Cohen stated in his _Handbook of Federal Indian Law_, _supra_, p. 126, the Indian Reorganization Act,

> * * * by affording statutory recognition of * * * [tribal] powers of local self-government and administrative assistance in developing adequate mechanisms for such government, may reasonably be expected to end the conditions that have in the past led the Interior Department and various state agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves. (Footnote omitted.)

Our conclusion may to some extent depart from earlier decisions of the office. Solicitor Harper held that the 1924 Act authorized New Mexico and Montana to levy various taxes on mineral royalties received by the Blackfeet and Ute Mountain Tribes, relying almost entirely on _British-American_, _supra_. 58 I.D. 535 (1943). Although that opinion postdates the 1938 statute, the leases in question had been "executed pursuant to * * * the Act of Feb. 28, 1891." 58 I.D. at 536. Under the circumstances, Solicitor Harper had no occasion to

consider the impact of the 1938 Act on his conclusion. While we do not believe our decision directly conflicts with Solicitor Harper's--since on the facts before him, British-American, clearly controls--this opinion would supersede that one as to leases executed under the 1938 Act. In 1956, Associate Solicitor Flannery issued an opinion which held, among other things, that the 1938 Act did not affect the taxing power of the State of New Mexico under the 1924 Act. Memorandum, May 4, 1956, M-36345, entitled "State Production Taxes on Tribal Royalties From Leases Other Than Oil and Gas." One year earlier, Associate Solicitor Flannery concluded that the Fort Peck Tribes' royalties may be taxed under the 1924 Act. Memorandum, Oct. 13, 1955, M-36310, entitled "Oil

and Gas Privilege and License Tax, Fort Peck Reservation, Under Laws of Montana." These decisions by Associate Solicitor Flannery are hereby reversed.

While our reading of the 1938 Act disposes of the question, we also conclude that the 1891 statute--25 U.S.C. § 397 (1970)--does not in any event cover tribal lands at Fort Peck. Those lands are not, in our view, "bought and paid for" within the meaning of that section. The dicta in British-American did not limit the interpretation of the "bought and paid for" clause in the 1891 statute "to lands acquired by Indians through the payment of a consideration in money" but also found it to include "lands reserved for Indians in return for a cession or surrender by them of other lands,

possession or rights."[12] Whether or not the Blackfeet lands were "bought and paid for" in British-American was dictum since the parties had stipulated to the applicability of the 1924 Act. The petitioner did not "question that the reservation as existing and occupied by the tribe in recent years comes within the terms of the proviso in the Act of 1891 as lands which the Indians have bought and paid for." The history of

12 The only other judicial decision construing the statute holds that the statute is satisfied "either by the payment of money, or exchange or surrender of the possession of other property." Strawberry Valley Cattle Co. v. Chipman, supra. In Strawberry, the Supreme Court of Utah held that the lands of the Uintah and White River Utes "were bought and paid for" (they surrendered the possession of other property). The Cherokee Indians are an example of another tribe which "bought and paid for" lands when they surrendered their lands east of the Mississippi to settle on lands west of Arkansas.

the Blackfeet Reservation shows that the Tribe's original territory, described in an 1855 treaty,[13] was set apart for them as a reservation by subsequent executive orders and Acts of Congress.[14] On May 1, 1888 (25 Stat. 113), Congress ratified agreements between the United States and

13 The Blackfeet Reservation was established pursuant to the treaty of Oct. 17, 1855, 11 Stat. 657. This treaty agrees to a particular territory as Blackfeet country (Art. 4), permits other tribes to have common hunting rights in that territory (Art. 3), agrees to passage of United States settlers through the territory, and to the establishment of roads, telegraph lines and military posts (Arts. 7 and 8).

14 "Under executive orders of 1873 and 1874, an Act of Congress of Apr. 15, 1874, c. 96, 18 Stat. 28, and executive orders of 1875 and 1880, the Blackfeet and certain of the other Indians associated with them came to occupy a large part of this original territory as a reservation specially set apart for them." British-American, at p. 162.

the Assiniboine, Sioux, Gros Ventre and Blackfeet Tribes in which the four tribes ceded the 1874 Act reservation to the United States except for three smaller reservations retained by the Tribes. The three reservations are Blackfeet, Fort Peck and Fort Belknap. Each of the Tribes, by various agreements as ratified by the 1888 Act, disclaimed any interest in the reservations set aside for other tribes (e.g., the Blackfeet Tribe disclaimed any interest in the Fort Peck and Fort Belknap Reservations, which between 1874 and 1888 had been the common property of all four tribes). By another agreement ratified on June 10, 1896 (29 Stat. 321, 353), part of the separate Blackfeet Reservation was ceded to the United States, and the remainder was set apart as the Tribe's future home. The

present Blackfeet Reservation was created as a result of the 1896 agreement, in which the Tribe ceded to the United States part of the separate reservation created for it in 1888, while retaining the remaining land as its reservation. The Court focused on this transaction in British-American.

There are a number of distinctions between Blackfeet and Fort Peck. The 1855 Treaty recognized Blackfeet title to aboriginal lands. Under later agreements and statutes, like the one in 1896, the Blackfeet retained some of their aboriginal lands but ceded other parts of these lands to the United States. By contrast, the Fort Peck Reservation was created by a grant of lands to the Tribes from the United States. It was initially

set aside by executive order,[15] confirmed by statute,[16] creating a single reservation of about 20 million acres for the "Gros Ventre, Piegan, Blood, Blackfeet, River Crow and other Indians."[17] The present reservation was separated from two other reservations--Blackfeet and Fort Belknap--by the Act of May 1, 1888, supra (which followed agreements with the Tribes that had interests in the larger reservation). But title had vested in the Tribes by virtue of eariler [sic] grants and not as a process of their surrender and cession of other lands. That is, as applied to

15 Executive Order of July 5, 1873, 1 Kapp. 855.

16 Act of Apr. 15, 1874, 18 Stat. 28.

17 "Other Indians" included the Assiniboine and Sioux Tribes. United States v. Assiniboine Tribes of Indians, 192 Ct. Cl. 679, 688-90, 428 F.2d 1324, 1328-30 (1970).

the Fort Peck Tribes, their reservation was not created out of lands reserved for them in return for their cession or surrender of other lands; the Assiniboine and Sioux Tribes did not buy these lands, they already owned them.[18]

Our review of prior interpretations of this "bought and paid for" provision has convinced us that its construction has not been altogether consistent. The requirement of an exchange, surrender and cession in British-American is not invariantly followed. For example, an 1892 letter by the Assistant Attorney General shortly after the 1891 Act[19]

18 Notably, Congress in 1922 enacted a special authority for leasing unallotted surplus lands at Fort Peck. 25 U.S.C. § 400 (1970).

19 Supra, Ftn. 3.

distinguishes treaty reservations from those established by "executive order or legislative enactment." Similarly, the Acting Secretary's 1937 letter transmitting the comprehensive mineral leasing proposal that became the 1938 Act states that the 1891 statute pertains only to "treaty reservations."[20] Of

20 The 1891 Act has historically been held inapplicable to executive order Indian reservations by the Department. 25 L.D. 408 (1897); 49 L.D. 139, 142 (1922). The reason for this, in part, was doubt as to whether these lands were public lands (in which case the United States would be entitled to lease revenues) or Indian trust lands (in which case the tribes would be entitled to the revenues). In 1919, Congress authorized some mineral leasing excluding oil and gas on executive order reservations in certain states, 25 U.S.C. § 399 (1970), and enacted the Mineral Leasing Act for public lands the following year. Attorney General Harlan Fiske Stone determined that executive order Indian reservation lands could not be leased as public lands, 34 Op. A.G. 171 (1924), and Congress by a 1927 Act provided for oil and gas leasing on all executive order reservations, 25 U.S.C. § 398a (1970).

course, if "bought and paid for" is so read, Fort Peck is also excluded, for it is not a treaty reservation.

From our research, however, we have been unable to discover a precise or consistent reading of "bought and paid for." However, the Supreme Court in British-American, supra, might have reasonably construed that clause to mean those lands actually purchased by Indians in a commercial setting. See Footnote 12, supra. The language is not a recognized term of art in Indian law. It was inserted into the Act in 1891 by the Conference Committee.[21] Prior to the

(Footnote 20, continued) It was not until the 1938 Act that mineral leases for other than oil and gas could be made on executive order reservations outside the states covered by the 1919 Act.

21 21 Cong. Globe 3118 (1891).

proviso's insertion, the bill would have covered all "Indian lands not needed for allotment, and not suitable for agriculture or farming, and [which would] not sell to the advantage of the Indians." Accordingly, some constriction must have been intended, but the Conference Report provides no edification of the Committee's intent. Nor is it apparent why Congress wished to distinguish for leasing purposes lands that had been "bought and paid for" from other unallotted tribal lands. Since virtually, all present Indian mineral leasing is under the 1938 Act, it is unnecessary for this office to reconcile these somewhat conflicting readings of the "bought and paid for" language, or to determine on a reservation-by-reservation basis whether

particular lands were "bought and paid for."

It is, accordingly, my conclusion that the State of Montana is without authority to apply its production tax to oil and gas produced from mineral leasing of tribal lands on the Fort Peck Reservation.

LEO KRULITZ.

<u>Oct. 27, 1966</u>

Dear Mr. Sonosky:

On Mar. 16, 1965, you filed an appeal as attorney for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation of Montana from a decision by the Deputy Commissioner of Indian Affairs

dated Feb. 25, 1965, affirming the applicability of the Montana tax on oil and gas production to oil and gas produced from leased Fort Peck tribal lands and authorizing tribal oil and gas lessees to pay directly to the State of Montana future taxes due on tribal royalty interests.

Your appeal is based on two assertions: first, that the Congress did not authorize State taxation of the tribal lands in question, and second, that the Montana tax violates both the Enabling Act under which Montana was admitted into the Union and the Montana Constitution, both of which provide that, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *."

More specifically, you first contend that Congress has not authorized State taxation here since the Act of May 29, 1924 (43 Stat. 244; 25 U.S.C. § 398 [1970]), authorizes taxes only on lands leasable under sec. 3 of the Act of Feb. 28, 1891 (26 Stat. 795; 25 U.S.C. § 397 [1970]). "Lands leasable under the 1891 Act are lands occupied by Indians who have bought and paid for the same." You claim that the lands of Fort Peck Reservation are not within the scope of the 1891 Act since they are not "bought and paid for."

The Fort Peck Reservation was created by an agreement ratified by Congress May 1, 1888 (25 Stat. 113). This agreement created the Fort Peck, Fort Belknap, and Blackfeet Reservations in return for which the Indians ceded to

the United States much of the land within an earlier reservation. The applicability of the Act of May 29, 1924 (43 Stat. 224; 25 U.S.C. § 398 [1970]), to the Blackfeet Reservation was considered in British-American Oil Producing Co. v. Board of Equalization of Montana, 299 U.S. 159 (1936). In that case, the Court recognized that the Blackfeet Reservation fell within the term of lands "bought and paid for" by the Indians, stating at p. 164:

"* * * by uniform administrative practice and by judicial decision this part of the proviso has been construed as not confined to lands acquired through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands,

possessions or rights, and citing 25 L.D. 408 and Strawberry Valley Cattle Co. v. Chipman, 13 Utah 454, 45 Pac. 348 (1896)."

The Fort Peck tribal oil and gas leases were approved under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. § 396 a-f) [1970]). This act is silent concerning taxation of the royalty interest but there is nothing inconsistent with the broad measure of the 1924 Act permitting State taxation. Sec. 7 of the 1938 Act repeals only those acts inconsistent with the 1938 Act. In an unpublished Opinion of the Solicitor, M-36310 (Oct. 13, 1955), it was decided that the Montana tax was assessable against royalties accruing from oil production on Fort Peck Reservation tribal land. After thorough consideration

in the Solicitor's Office, nothing in this appeal has been found which indicates error in the 1955 opinion.

Finally, we come to the contention that Montana's tax violates the Enabling Act of Feb. 22, 1889 (25 Stat. 676), and Ordinance No. 1, Constitution of the State of Montana, both of which provide that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." The Montana Supreme Court, in British American Oil Producing Co. v. Board of Equalization of Montana, 101 Mont. 293, 54 P.2d 129, affirmed, 299 U.S. 159 (1936), rehearing denied, 299 U.S. 624 (1937), considered this issue, which was raised by the Blackfeet Tribe, and held that neither the Enabling Act nor the

Montana Constitution prevented the imposition of the royalty interest tax. As recently as 1961 the Supreme Court had occasion in Kake Village v. Egan, 369 U.S. 60 [1962], to examine similar disclaimer language in Alaska's Enabling Act. There the Court quite clearly indicated that such disclaimers by the States are of proprietary rather than of governmental interests. We, therefore, cannot agree that Montana is prohibited either by its Enabling Act or constitution from taxing the tribal royalty interest.

For the reasons stated, we concur in the decision of the Deputy Commissioner and, accordingly, dismiss the Tribes' appeal.

Sincerely yours,

HARRY R. ANDERSON,

Acting Secretary of the Interior.

Dec. 2, 1966

Dear Mr. Sonosky:

Your letter of Nov. 4, 1966 to the Secretary of the Interior petitions for reconsideration of the decision of Oct. 27, 1966, rendered by the Assistant Secretary which affirmed a decision dated Feb. 25, 1965 of the Deputy Commissioner of Indian Affairs, which held applicable to oil and gas produced from the tribal lands on the Fort Peck Indian Reservation the Montana production tax and authorized lessees to pay such taxes directly to the State. You assert, as you did in your original appeal, that the Fort Peck Reservation is not land "occupied by Indians who bought and paid for the same" within the meaning of the Act of Feb. 28, 1891, 26 Stat. 795, 25 U.S.C. § 397 and

that, therefore, oil and gas produced from these lands is not subject to state taxation under the Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. § 398 [1970].

The Fort Peck Reservation was established by an agreement approved by the Act of May 1, 1888 (25 Stat. 113, 1 Kappler 261). That agreement created separate Fort Peck, Fort Belknap, and Blackfeet Reservation from a much larger area which had been reserved in 1874 for certain tribes in common. The Act of May 1, 1888, created three separate and distinct reservations and set them apart respectively for 1) a band of the Assiniboine Tribe and the Sioux Tribe (Fort Peck), 2) another band of the Assiniboine Tribe and the Gros Ventre Tribe (Fort Belknap) and, 3) the Blackfeet Nation (Blackfeet). While it is true that the tribes did receive monetary

considerations for the cessions and reliquishments [sic] which they made under this agreement, we are convinced that the agreement cannot be construed as meaning that these considerations were exclusive. In _British-American Oil Producing Co._ v. _Board of Equalization_, 299 U.S. 159 (1936), the Court characterized the agreement as entailing "various considerations moving from the Blackfeet to the United States and the reverse, and from the Blackfeet to their associates and the reverse." _Op. cit._ p. 162. In this respect, the situation of the Fort Peck Indians is in no wise different from that of the Blackfeet. We are convinced that the setting apart and the confirmation of separate reservations for the exclusive use of particular tribes must be regarded as partial consideration for what each surrendered.

But even if it could be said that the reservations established by the agreement and Act of 1888 were in no part _quid pro quos_ for what the Indians gave up, still it is probable that the lands of their respective reservations would be considered "bought and paid for" within the meaning of the Act of 1891. In 10 Op. A.A.G. 122, cited in 25 L.D. 408, 412 [1897], the Assistant Attorney General observes:

"It has been repeatedly ruled that Indians who are in possession of lands that have been given to them by the United States, for permanent occupancy, where Congress has recognized the right and title of the Indians to such lands, hold said lands as purchasers having paid for the same, in the sense in which the words 'have paid for the same' are used in the Act of 1891."

In this view, the words "bought and paid for" are merely intended to distinguish lands in which Indians have a compensable property right under the Constitution from those, such as unconfirmed executive order reservations, in which they do not. Cf. Sioux Tribe v. United States, 316 U.S. 317 (1942); Hynes v. Grimes Packing Co., 337 U.S. 86, 103 (1948); Healing v. Jones, 174 F. Supp. 211, 216; 210 F. Supp. 125, 138 (1962).

Your next contention is that the case of British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), does not support the holding of the Assistant Secretary because British-American conceded that the Blackfeet Reservation had been "bought and paid for" as, you assert, it was required to do to sustain the validity of its lease.

It appears from the opinion that British-American was not relying upon the Act of 1891 as authority for issuance of the lease under which it claimed but, on the contrary, was contending that its lease should be deemed to have been granted under special acts relating to the Blackfeet Tribe. In any event, the Court states that the reason for the concession was doubtless that the petitioner recognized that by uniform administrative practice and by judicial decision the "bought and paid for" provision of the 1891 Act had been construed as not confined to lands acquired by Indians by the payment of monetary consideration, but equally to lands reserved for Indians in return for a cession or surrender by them of possessions or rights. We think it clear

that the Court gave explicit approval to the application of the "bought and paid for" provision of the 1891 Act to the Blackfeet Indian Reservation which, as noted, was established under the 1888 Act in the same manner as the Fort Peck Reservation.

Finally, you contend that the question whether the State tax is compatible with the State constitution was not addressed in the British-American case. You submit that the Blackfeet Tribe was not involved in that litigation and that the issue could not have been authoritatively disposed in its absence. While it does not appear that the Tribe participated in case in the Supreme Court of the United States, there can be no doubt that it participated below. The State Supreme Court's opinion, 54 P.2d

129 [1936], states that the Blackfeet Tribe filed a complaint in intervention (Ibid. at p. 129), and contains the following:

> "It is urged most strenuously by counsel on behalf of the tribe that the taxing of royalties, if permitted to stand, is in violation of the treaties and agreements between the Indians and the United States and also in violation of our State Constitution." (Ibid. at p. 133.)

It is obvious from a reading of the opinion that the issue of State power was raised in the case by the Blackfeet Tribe and was not developed, as suggested by your letter, solely as an issued [sic] between the State and British-American.

Your arguments have not persuaded us that the conclusion reached in the decision of Oct. 27, 1966--that the land in question was "bought and paid for" within the meaning of the Act of Feb. 28,

1891 (26 Stat. 795, 25 U.S.C. § 397 [1970])--is erroneous. The petition for reconsideration is hereby denied.

Sincerely yours,

ROBERT E. VAUGHAN

Deputy Assistant Secretary of the Interior.

Opinion of the Department of Interior, M-36896 (Supp.), March 2, 1979, "Tax Status of the Production of Oil and Gas from Jicarilla Apache Tribal Lands Under the 1938 Indian Mineral Leasing Act"

TO: ASSISTANT SECRETARY--INDIAN AFFAIRS

FROM: SOLICITOR

SUBJECT: TAX STATUS OF THE PRODUCTION OF OIL AND GAS FROM JICARILLA APACHE TRIBAL LANDS.

I advised you by a Nov. 7, 1977, opinion (M-36896, 84 I.D. 905 (1977)), that tribal royalties from production of oil and gas on Fort Peck tribal lands under leases made pursuant to the 1938 Indian Mineral Leasing Act, 52 Stat. 347, 25 U.S.C. §§ 396a-396f (1970), are not taxable by the State of Montana. You have now requested my opinion as to whether a like conclusion is applicable to tribal royalties from leases of Jicarilla Apache tribal lands, with respect to taxation by the State of New Mexico.

The State of Montana asserted authority to levy taxes on production from the Fort Peck lands under purported sanction of 25 U.S.C. § 398 (1970) (Act of May 29, 1924, 43 Stat. 244); which had authorized taxation of production from tribal lands leased under 25 U.S.C. § 397 (1970) (Act of Feb. 28, 1891, 26 Stat. 795), that is, "bought and paid for" tribal lands. I concluded that the 1938 Leasing Act, which contained a comprehensive mineral leasing scheme but which did not contain a provision authorizing state taxation of production, did not incorporate the express taxing provision in the 1924 Act (25 U.S.C. § 398), and that therefore § 398 did not authorize taxation of royalties from production under leases made pursuant to the 1938 Act. I also noted in that opinion that there is no other statute

which might grant authority for state taxation of Indian royalties from such leases.

The Jicarilla Apache Reservation is distinguishable from Fort Peck in that it is an Executive Order reservation, and New Mexico taxes production of oil and gas thereon under purported authority of 25 U.S.C. § 398c. That section, worded similarly to the taxing proviso in § 398, was part of the Act of Mar. 3, 1927, 44 Stat. 1347, 25 U.S.C. §§ 398a-398e, which authorized mineral leasing on Executive Order reservations. Both that Act and its legislative history made clear that Congress intended the leasing authority for tribal lands on Executive Order reservations and the policy of permitting the states to tax production thereon to be the same as that applicable to

"bought and paid for" reservations.[1]

As discussed in the Nov. 1977, opinion, the 1938 Act replaced the earlier fractionated leasing authorities (including §§ 398a-398e) with a comprehensive and uniform scheme for all reservations with a few specific exceptions.[2] Sec. 398c cannot be distinguished from § 398 in this regard. Both were enacted prior to the 1938 Act, and the effect of the 1938 Act was the same on both. Thus, if the taxing proviso in § 398 was not incorporated into the 1938 Act, as I earlier concluded, neither was the taxing proviso in § 398c. Accordingly, it is my conclusion that taxation of production on

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1 See, e.g., S. Rep. 1240, 69th Cong. 2nd Sess. (1927); S. Rep. 768, 69th Cong. 1st Sess. (1926).

2 The specific exceptions are named in § 6 of the 1938 Act, 25 U.S.C. § 396f.

Jicarilla Apache tribal lands from leases made under the 1938 Leasing Act is not authorized by § 398c. Absent specific statutory permission, New Mexico lacks authority to tax Indian property. (Solicitor's Opinion, M-36896 at 84 I.D. 10 (1977)). Thus, New Mexico may not tax royalties received by the Jicarilla Apache Tribe from 1938 Act leases.

LEO KRULITZ,

Solicitor.

APPENDIX I

S. REP. NO. 546

68TH CONG., 1ST SESS. (1924)

May 14, (calendar day, May 15), 1924--

Ordered to be printed

Mr. Harreld, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 6298]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 6298) to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian Reservations affected by the proviso to section 3 of the act of February 28, 1891, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are set forth in House Report No. 386, Sixty-eighth Congress, which is appended hereto and made a part of this report.

There is also attached a letter from the Acting Secretary of the Interior, under date of May 10, 1924.

[House Report No. 386, Sixty-eighth Congress, first session]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 6298) to permit the leasing of unallotted lands of Indians for oil and gas purposes for a stated term and as long thereafter as oil or gas is found in paying quantities, and for other purposes, having considered the same, report thereon with a recommendation that it do pass with the following amendments:

Strike out all after the enacting clause and insert the following:

"That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation, subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795), may be leased at public auction by the Secretary of the Interior with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities:

Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

Amend the title to read:

"A bill to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian reservations affected by the proviso to section 3 of the act of February 28, 1891."

This legislation meets the approval of the Department of the Interior, as is

evidenced by the letter from the Secretary of the Interior which is attached hereto and made a part of this report.

DEPARTMENT OF THE INTERIOR,

Washington, March 22, 1924.

HON. HOMER P. SNYDER,

Chairman Committee on Indian Affairs,

House of Representatives.

MY DEAR MR. SNYDER: I have your letter of March 13, 1924, asking whether this department will approve the proposed amendment to the redraft of H. R. 6298, providing that the production of oil and gas and other minerals on restricted unallotted Indian lands may be taxed by the State in which the lands are located in all respects the same as production on unrestricted land.

This department realizes that the State should at least be permitted to tax

the lessees' interest in any production of minerals on restricted unallotted Indian lands and will offer no objection to including a tax on the royalty belonging to the Indians under the conditions named in the proposed amendment.

Very truly yours,

HUBERT WORK.

DEPARTMENT OF THE INTERIOR,

Washington, February 25, 1924.

HON. H. P. SNYDER,

Chairman Committee on Indian Affairs,

House of Representatives.

MY DEAR MR. SNYDER: I have your request for a report on H. R. 6298, a bill to permit the leasing of unallotted Indian land for oil and gas mining purposes for the time therein stated.

Unallotted Indian lands are subject to lease under the proviso of section 3 of the act of February 28, 1891 (26 Stat. L. 795), for mining purposes for a period of 10 years and it is believed that legislation should be enacted whereby oil and gas leases of such lands may be continued for so long as there is production in paying quantities.

In order to accomplish this I have redrafted the proposed bill, making it applicable to oil and gas mining leases on unallotted lands falling under section 3 of the act of February 28, 1891, and recommend that such legislation receive favorable consideration.

Very truly yours,

HUBERT WORK.

DEPARTMENT OF THE INTERIOR,

Washington, May 10, 1924.

HON. JOHN W. HARRELD,

Chairman Committee on Indian Affairs,

United States Senate.

MY DEAR MR. HARRELD: I have your letter of April 28, 1924, requesting an opinion on H. R. 6298, a bill to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian reservations affected by the proviso to section 3 of the act of February 28, 1891 (26 Stat. L. 795).

The proviso to section 3 of the act cited authorizes the leasing of unallotted Indian lands for mining purposes for a period not to exceed 10 years, and it is believed that oil and gas leases should be continued for as long as there is paying production, as provided by H. R. 6298.

The form of the bill is the same as that on which a favorable report was made to the House committee, except that in lines 3 and 4 the words "other than lands of the Five Civilized Tribes and the Osage Nation," and in line 8 the words "public auction" have been added, and the bill also contains an additional provision permitting the State to tax the production of minerals including the royalty interest of the Indians.

To avoid any question arising as to the applicability of the bill to lands of the Five Civilized Tribes and the Osage Nation, the insertion therein of the words excluding such lands from its operation appears prudent, and as the department is following the policy of letting oil and gas leases on unallotted lands at public auction, no objection is seen to prescribing that method by law.

It is realized that the State should at least be permitted to tax the lessees' interest in any production of minerals on restricted unallotted Indian lands, and this department will offer no objection to including a tax on the royalty belonging to the Indians under the conditions named in the bill.

Favorable consideration of the proposed legislation is recommended.

Very truly yours,

E. C. FINNEY, Acting Secretary.

S. REP. NO. 614

74TH CONG., 1ST SESS. (1935)

Mr. Thomas of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2638]

The Committee on Indian Affairs, to whom was referred the bill (S. 2638) to amend the law governing the leasing of unallotted Indian lands for mining purposes, having considered the same, report thereon with a recommendation that it do pass without amendment.

This bill was introduced at the request of the Secretary of the Interior as set forth in his letter of April 15, 1935, a copy of which is appended hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,

Washington, April 15, 1935.

HON. ELMER THOMAS,

Chairman Committee on Indian Affairs,

United States Senate.

MY DEAR MR. CHAIRMAN: I transmit herewith a proposed bill to govern the leasing of unallotted Indian lands for mining purposes.

Under section 26 of the act of June 30, 1919 (41 Stat. 31), as amended, leases may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 25, 1891 (25 Stat. 795), as amended May 29, 1934 (43 Stat. 244), leases may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian

Reorganization Act, approved June 18, 1934 (48 Stat. 954), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation may be issued will be empowered to lease their lands for periods of not more than 10 years. There is at present no law under which Executive order lands may be leased outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. One of the provisions of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.

The act of June 30, 1919, requires the formal opening of lands for prospecting, location, and lease, by the Secretary of the Interior, before an application for a lease for minerals other than oil and gas can be considered. It also requires that a person desiring to lease shall locate the mining claims as under the United States mining laws, file formal location notice; and, under the regulations, he must have the lands surveyed if they have not already been surveyed, all in accordance with the mining laws applicable to the public domain. This frequently results in long delay and is often quite an expense to an applicant for a lease. Frequently, we have requests for leases for the purpose of removing sand and gravel for road-grading purposes, or for the quarrying of stone, either for building

or grading purposes in connection with which there would be but little under-surface workings. In such a case the applicant for a lease is required to go through all the formality and expense necessary to acquiring actual mining leases. Sometimes the time and expense of making the locations and of having the land surveyed are more than he cares to undertake, although the material he desires may be very conveniently located and could be profitably utilized and, consequently, the opportunity to lease the land is lost, and the revenue, while perhaps not a great deal in a particular instance, would amount to considerable in such cases throughout the entire Service.

Section 26 of the act of June 30, 1919, supra, as amended by the acts of March 3, 1921 (41 Stat. 1231) and December 16, 1926 (44 Stat. 922-925),

places unallotted Indian lands within the States mentioned therein upon the same basis for prospecting and leasing for metalliferous minerals as lands of the public domain, after such Indian reservation lands have been declared opened by the Secretary of the Interior. It has been held that the Secretary of the Interior has no discretion under the said section in the matter of granting a lease to an applicant who has properly located his claim and complied with the laws and regulations of the Department thereunder; and in several instances it has been necessary to grant the lease notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands. In other words, under that law, neither this Department nor the Indian Tribal Council is in a position to prevent the acquisition of a lease after

the lands have been declared open to prospecting and lease, and the Indians at no time have any voice in the granting of such leases.

It is not believed that the present law is adequate to give the Indians the greatest return from their property. As stated, present law provides for locating and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian lands that are not present in applying for a claim on the public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey

markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

The most urgent change is in the interest of leasing deposits of building stone, sand, gravel, coal, and many other minerals. For instance, the well-known iron deposit on the Fort Apache Indian Reservation, outcropping along the canyon wall for a distance of about 2 miles, and 20 feet thick, with an estimated ore reserve of over 15,000,000 tons, now must be "discovered" and located and monumented and then an application made for a lease. Under the present law only the outcrop along the canyon wall can be taken up under the lease as there are no outcrops of iron ore back from the face

of the cliff. This deposit, it is believed, should be leased to the highest bidder at public auction and in definite areas rather than to anyone who erects a few monuments along the outcrop and applies for a preference right to a lease through tying up the land with a long strip 600 feet wide. This deposit of iron ore is about 30 miles from a railroad, and any concern considering building a railroad and developing the property would want a reserve greater than 600 feet back from the edge of the cliff. This deposit should appropriately be laid out in blocks extending at least 1 mile back from the outcrop.

Coal deposits on the several reservations are not adaptable to the discovery and location feature of the present act which has very limited applications. The presence of coal is

usually known by geological association, and leases may be made with reasonable assurance before any coal is actually exposed on the land. Deposits of marl along the west side of Pyramid Lake, Nev., can be seen for a distance of many miles, yet they must be "discovered" and "located" in accordance with the provisions of law relating to placer-mining claims and leased to the person who erects monuments thereon. Deposits of sand, gravel, and building stone are now similarly leased, even though the deposits are well known and could be leased to greater advantage to the Indians in definite areas.

The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of unallotted Indian lands for general mining purposes. It will effect no change in the present law

for leasing oil and gas lands and will bring all mineral leas[illegible] matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

The Acting Director of the Bureau of the Budget has advised by letter of April 5 that the proposed legislation would not be in conflict with the financial program of the President.

Sincerely yours,

T.A. WALTERS,

Acting Secretary of the Interior.

S. REP. NO. 985

75TH CONG., 1ST SESS. (1937)

July 22 (calendar day, July 28), 1937

Ordered to be printed

Mr. Thomas of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2689]

The Committee on Indian Affairs, to whom was referred the bill (S. 2689) to regulate the leasing of certain Indian lands for mining purposes, having considered the same, report thereon with the recommendation that it do pass without amendment.

The proposed legislation was suggested by the Secretary of the Interior in a communication dated June 17, 1937, addressed to the President of

the Senate, who referred the same to your committee for consideration; thereafter, your committee authorized the introduction of a bill (S. 2689) for the purpose of carrying out the wishes of the Secretary of the Interior, and thereupon said bill (S. 2689) was referred to your committee for further consideration.

The communication of the Secretary of the Interior, dated July 17, 1937, above referred to, is attached hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,

Washington, June 17, 1937.

THE PRESIDENT OF THE SENATE.

MY DEAR MR. PRESIDENT: I transmit herewith a proposed bill to govern the leasing of Indian lands for mining purposes.

Under section 26 of the act of June 30, 1919 (41 Stat. 31), as amended,

leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 28, 1891 (26 Stat. 785), as amended May 29, 1924 (43 Stat. 244), leases for oil, gas, and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian Reorganization Act, approved June 18, 1934 (46 Stat. 984), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years. There is at present no

law under which Executive-order lands may be leased for mining, outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. One of the purposes of the legislation now proposed, therefore, is to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.

The act of June 30, 1919 requires the formal opening of lands for prospecting, location, and lease, by the Secretary of the Interior, before an application for a lease for minerals other than oil and gas can be considered. It also requires that a person desiring to lease shall locate the mining claims as under the United States mining laws,

file formal location notice; and under the regulations he must have the lands surveyed if they have not already been surveyed, all in accordance with the mining laws applicable to the public domain. This frequently results in long delay and is often quite an expense to an applicant for a lease. Frequently we have requests for leases for the purpose of removing sand and gravel for road-grading purposes, or for the quarrying of stone, either for building or grading purposes in connection with which there would be little or no under-surface workings. In such cases, applicants for leases are required to go through all the formality and expense necessary to acquiring actual mining leases. Sometimes the time and expense of making the locations and of having the land surveyed are more than they care to

undertake although the material desired may be very conveniently located and could be profitably utilized; and consequently the opportunity to lease the land is lost and the revenue, while perhaps not a great deal in a particular instance would amount to considerable in such cases through the entire Indian Service.

Section 26 of the act of June 30, 1919, supra, as amended by the acts of March 3, 1921 (41 Stat. 1231), and December 16, 1926 (44 Stat. 922-923), places unallotted Indian lands within the States mentioned therein upon the same basis for prospecting and leasing for metalliferous minerals as lands of the public domain, after such Indian reservation lands have been declared opened by the Secretary of the Interior. It has been held that the Secretary of

the Interior has no discretion under the said section in the matter of granting a lease to an applicant who has properly located his claim and complied with the laws and regulations of the Department thereunder; and in several instances it has been necessary to grant the lease notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands. In other words, under that law, neither this Department nor the Indian Tribal Council is in a position to prevent the acquisition of a lease after the lands have been declared open to prospecting and lease, and the Indians at no time have any voice in the granting of such leases.

It is not believed that the present law is adequate to give the Indians the greatest return from their property. As stated, present law provides for locating

and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian lands that are not present in applying for a claim on the public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

The most urgent change is in the interest of leasing deposits of building

stone, sand, gravel, and metalliferous minerals. For instance, the well-known iron deposit on the Fort Apache Indian Reservation, outcropping along the canyon wall for a distance of about 2 miles and 20 feet thick, with an estimated ore reserve of over 15 million tons, now must be "discovered" and located and monumented and then an application made for a lease. Under the present law only the outcrop along the canyon wall can be taken up under the lease as there are no outcrops of iron ore back from the face of the cliff. This deposit, it is believed, could be leased to better advantage at public auction and in definite areas rather than to anyone who erects a few monuments along the outcrop and applies for a preference right to a lease, through tieing up the land with a long strip 600 feet wide. This deposit

of iron ore is about 30 miles from a railroad, and anyone interested and considering building a railroad and developing the property would want a reserve greater than 600 feet back from the edge of the cliff. This deposit should appropriately be laid out in blocks extending at least 1 mile back from the outcrop.

Coal deposits on the several reservations are not adaptable to the discovery and location feature of the present act, which has very limited application. The presence of coal is usually known by geological association, and leases may be made with reasonable assurance before any coal is actually exposed on the land. Deposits of marl along the west side of Pyramid Lake, Nev., can be seen for a distance of many miles, yet they must be "discovered" and

"located" in accordance with the provisions of law relating to placer mining claims and leased to the person who erects monuments thereon. Deposits of sand, gravel, and building stone are now similarly leased, even though the deposits are well known and could be leased with greater advantage to the Indians in definite areas.

The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

The Acting Director of the Bureau of the Budget has advised that there is no

objection to the presentation of this report to the Congress.

Sincerely yours,

CHARLES WEST,

Acting Secretary of the Interior.

H. REP. NO. 1872

75TH CONG., 3D SESS. (1938).

Mr. Rogers of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 7626]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 7626) to regulate the leasing of certain Indian lands for mining purposes, having considered the same, report thereon with a recommendation that it do pass without amendment.

This proposed bill received the unanimous vote of your committee.

The proposed legislation was suggested by the Secretary of the Interior as can be seen by the following letter addressed to the Speaker of the House of Representatives:

DEPARTMENT OF THE INTERIOR,

Washington, June 17, 1937.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES:

MY DEAR MR. SPEAKER: I transmit herewith a proposed bill to govern the leasing of Indian lands for mining purposes.

[Text of letter is omitted. It is a duplicate of the letter appearing in S. Rep. No. 985, 75th Cong., 1st Sess. (1937), *supra* at 343.]

Sincerely yours,

CHARLES WEST,

Acting Secretary of the Interior.